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1907.

THE

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AND ON APPEAL THEREFROM IN THE

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OF

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1907.

The Right Hon. Sir John Gorell Barnes, Knt., President.
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1907.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE COURT OF APPEAL.]

C. A.

1906

Nov. 10.

THE BIRNAM WOOD.

Admiralty—Practice—Charging Order for Costs on Property "recovered or preserved"—Application ex parte — Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Charge on Ship—Constructive Notice—Priority.*

After the termination of an action in rem against the owners of a ship for wages and disbursements in which the plaintiff was partially successful, and after the release of the ship from arrest and its transfer to a limited company, the solicitors of the original defendant owners applied ex parte and obtained, under s. 28 of the Solicitors Act, 1860, a charging order upon the ship for their costs in the action. For the enforcement of this charge they also obtained, on notice to mortgagees to whom the vessel had been mortgaged by the limited company, a further order for the appointment of a receiver of freight, and, conditionally, for the sale of the vessel. Both orders were subsequently set aside, and the solicitors, admitting that the charging order must be postponed to the mortgage, appealed as against the limited company:—

Held by the Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.), affirming the decision of Sir Gorell Barnes, President, that the charging order was wrong in form and bad in substance, and,

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1906
THE BIRNAM WOOD.

together with the consequential order, must be set aside, for, at the most, the property, if any, preserved by the exertions of the solicitors was limited to the interest of those who instructed them to oppose the claims of the master in respect of his lien on the barque, and the vessel had not only ceased to be under the control of the Court, but had changed hands, and become subject to a mortgage, before the charging order was applied for. Furthermore, the company, to whom the vessel was transferred, could not be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors, even though the actual vendor and the promoter of the company were one and the same person.

The Court, when sitting in Admiralty, should follow the practice of the Chancery Division in requiring notice to the parties affected, and, unless the circumstances are very exceptional, should not exercise, on an ex parte application, its discretionary power of making charging orders under the Solicitors Act, 1860.

APPEAL by solicitors acting for the defendant owners of the *Birnam Wood*, in an action in rem for wages and disbursements, against the rescission by Sir Gorell Barnes, President, of a charging order, made under s. 28 of the Solicitors Act, 1860 (1), and a conditional order for the sale of the barque.

On June 22, 1905, the plaintiff Llewellyn Cook, master of the *Birnam Wood*, issued a writ in an action in rem in the Liverpool District Registry against the owners of the barque for 625*l.* 11*s.* 3*d.*, balance of wages earned and disbursements

(1) 23 & 24 Vict. c. 127, s. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. . . . ."

incurred by him as master of the vessel. The defendants' solicitors, Lightbound, Owen & MacIver, of Liverpool, the present appellants, were instructed by John Wotherspoon, who was managing owner and registered owner of sixty-four sixty-fourths of the vessel, though personally he was only interested to the extent of 1166*l.* 13*s.* 4*d.* out of a total value of 2416*l.* 13*s.* 4*d.*, he being a trustee for the remaining 1250*l.* on behalf of members of his own family, the plaintiff, and a brother of the plaintiff. On July 26 the action came before Bargrave Deane J., when the claim was, together with a counter-claim in respect of the plaintiff's proportion of a loss on the preceding voyage, referred to the Liverpool district registrar and a merchant. On November 17 the district registrar certified that there was due from the defendants to the plaintiff on the claim 429*l.* (that is, 196*l.* 11*s.* 3*d.* less than originally claimed), and from the plaintiff to the defendants on the counter-claim 108*l.* 5*s.* 9*d.* On November 24 judgment was entered for the plaintiff for 320*l.* 14*s.* 3*d.*, the balance of claim and counter-claim with costs, being 304*l.* 17*s.* less than the amount claimed. On November 29, the defendants having agreed to take over the plaintiff master's interest, amounting to 800*l.*, in the vessel, and having paid the claim and given an undertaking to pay the plaintiff's taxed costs, the barque was released from arrest. In December John Wotherspoon bought out his co-owners, leaving only himself in the sum of 2266*l.* 13*s.* 4*d.* and three relatives to the extent of 50*l.* each interested in the vessel, and the barque was transferred to the Birnam Wood Ship Company, Limited, which had been registered on December 20, 1905, and whose registered office was at 51, South John Street, Liverpool, where the defendant John Wotherspoon also carried on business. The 1750 shares of 1*l.* each in the company were allotted to John Wotherspoon or his nominees, consisting almost entirely of members of his family. There were no directors, and John Wotherspoon was, under the terms of the contract of sale, to be manager for life. On December 27 the company mortgaged in the usual form the *Birnam Wood* to Parr's Bank, Limited, to secure an account current between the company and the bank. The mortgage was duly registered the next day, and a sum of

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498*l.* 12*s.* 3*d.* was at the date of the hearing of the appeal owing on that account. Lightbound, Owen & MacIver ascertained by an inspection of the ship's register that the vessel had been sold and a mortgage executed, and, on February 7, 1906, they rendered to John Wotherspoon their bill of costs, amounting to 281*l.* 9*s.* 5*d.*, of which only 20*l.* had been paid on June 27, 1905, on account of disbursements in the action. On June 20, 1906, upon the ex parte application at chambers of Lightbound, Owen & MacIver, Bargrave Deane J. ordered that they, as solicitors for the defendants in the action Llewellyn Cook *v.* the owners of the barque, should have a charge upon the *Birnam Wood* for their costs, charges, and expenses of and in reference to the action, except that the barque should, to the extent of 320*l.* 14*s.* 3*d.* (the amount of the judgment recovered by the plaintiff), be free from the operation of the charging order.

For the purpose of enforcing this charge Lightbound, Owen & MacIver, as solicitors for the defendants in the same action, and on notice to Parr's Bank, Limited, but, by mistake, not to the Birnam Wood Ship Company, Limited, applied to Bargrave Deane J. and obtained, on July 30, an order providing that a receiver should be appointed to receive freights, profits, and moneys in respect of the barque *Birnam Wood*, and, if necessary, to take possession; that the *Birnam Wood* should be sold for the purpose of paying off the amount due under the charging order; but that such sale should not be carried into effect without an order of the Court, and that the proceeds of sale when lodged in Court should not be paid out without leave, and the order was to be without prejudice to other claims and to all questions of priority, with liberty to apply.

On August 8 the mortgagees, Parr's Bank, Limited, as interveners, and on notice to the solicitors and to the owners of the barque, applied to Bargrave Deane J. that the charging order, made on June 20, 1906, might be discharged or postponed to the bank's mortgage, and that the order for sale, made on July 30, might be set aside.

The summons was adjourned into Court, and heard by Sir Gorell Barnes, President, on October 29, when it was contended by—

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Alex. D. Bateson, on behalf of the mortgagees, Parr's Bank, Limited, that both orders should be discharged, as there was no property "preserved" within the meaning of the Solicitors Act, nor, in fact, any property at all, for there was none under the control of the Court at the time the charging order was made; that the making of the order was discretionary, so that no lien arose as of right on the performance of the services; that it was too late to apply for such an order six months after the termination of the litigation; and that Parr's Bank was in the position of a bona fide purchaser for value without notice, for the first intimation to the bank of the existence of the charging order was on July 27, 1906, when a copy of the summons was served upon their Liverpool branch, and reliance was placed on the dictum of Sir James Hannen in *The Livietta* (1) that "a mortgage created by the client for the benefit of a person having no notice of the litigation would not be superseded by a charging order subsequently obtained by the solicitor." The following cases were also referred to: *In re Deakin* (2); *Shippey* v. *Grey* (3); *Ross* v. *Buxton*. (4)

Dawson Miller, on behalf of the Birnam Wood Ship Company, Limited, supported the intervention of Parr's Bank, Limited, and referred to *The Philippine* (5), the facts of which case are more fully set out in the judgment of Wills J. in *Pelsall Coal and Iron Co.* v. *London and North-Western Ry. Co.* (6) He also referred to *Foxon* v. *Gascoigne*. (7)

H. C. S. Dumas, for the solicitors, Lightbound, Owen & MacIver, submitted that the charging order of June 20, which it was sought to discharge, and the order of July 30, which it was sought to set aside, were both final orders made by the judge in chambers, and could not be discharged or set aside by another order made in chambers; that the mortgagees were served with a copy of the summons which resulted in the order of July 30, and could have raised their present objection on the hearing of

(1) (1883) 8 P. D. 209, at p. 213.
(2) [1900] 2 Q. B. 489.
(3) (1880) 49 L. J. (Q.B.) 524.
(4) (1889) 42 Ch. D. 190, at p. 199.
(5) (1867) L. R. 1 A. & E. 309.
(6) (1892) 8 Ry. & Ca. Tr. Cas. 146.
(7) (1874) L. R. 9 Ch. 654, at p. 659.

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the summons, and, therefore, only a Court of Appeal could now interfere. Secondly, on the merits, that at the time of the institution of the action of *Cook* v. *the Owners of the Birnam Wood*, John Wotherspoon was the sole registered owner of the barque, and Lightbound, Owen & MacIver received their instructions from him. As his solicitors in that action they were entitled to a lien upon the ship to the extent of 304*l.* 17*s.*, being the difference between 625*l.* 11*s.* 3*d.*, the amount of the plaintiff's claim in the action, and 320*l.* 14*s.* 3*d.*, the amount of the judgment, as being property recovered by or preserved for the defendants within the meaning of s. 28 of the Solicitors Act, 1860. The charging order was, therefore, correctly made in favour of the applicants for the amount of the taxed costs, charges and expenses of the firm as solicitors for the defendants in the action in priority to any other parties claiming an interest in the vessel, together with the usual reference for taxation and an order for sale, for such a charge, when declared in pursuance of the Act, was in the nature of salvage, and might be made on the interest of persons who did not employ the solicitors, and who were not parties to the suit, if they adopted the benefit obtained in the suit—*Greer* v. *Young* (1): that it was not until the termination of the proceedings in the action that the *Birnam Wood* was transferred to her present owners, the Birnam Wood Ship Company, Limited; such transfer by John Wotherspoon as sole registered owner practically to himself as manager for life of the company was an act done to defeat, or which would operate to defeat, the charge—see *The Paris* (2)—so that the company could not be regarded as bona fide purchasers for value without notice of the liability for the solicitors' unpaid costs, the notice required by the Act not being necessarily notice of the claim, but notice of the right of the solicitors to the lien of which it must be inferred that the company had constructive notice, and as the mortgagees could not have a better title than their mortgagors, the mortgage by the Birnam Wood Ship Company to Parr's Bank, Limited, was equally ineffectual against the prior claim of the solicitors: that the claim against which the solicitors by their exertions had protected the ship

(1) (1883) 24 Ch. D. 545. (2) [1896] P. 77.

was a claim in rem in respect of which the plaintiff would have had a maritime lien had he succeeded, and, therefore, the solicitors' lien would have the same priority as the maritime lien which had been displaced, and which would have had priority even over a claim by a bona fide purchaser: see the argument in *The Heinrich* (1) on the question of the lien of the solicitor for his costs relating back to the commencement of the suit in which those costs were incurred. The following cases were also referred to: *In re Suffield and Watts* (2); *Scholey* v. *Peck*. (3)

SIR GORELL BARNES, PRESIDENT, in setting aside the charging order and the order for sale, summarized the facts, already set out, and continued:—I confess to feeling some difficulty in at present knowing how this charging order came to be made in the form in which it appears, because it is quite clear that whatever view is taken of the case, even if it be correct to say that property was recovered or preserved, it was certainly not the whole of the barque which was preserved, but only the interest of those persons who were instructing the solicitors to oppose the claim of the captain. However, the charging order was, on June 20 of the present year, made, and for the purpose of enforcing it a summons was served upon the mortgagees, but by some slip not upon the owners, so that they were not represented, and on July 30 an order was obtained for the appointment of a receiver and a conditional sale of the ship. [The learned President read the terms of the order already set out.] The present application is made by the bank and supported by the owners of the vessel to get rid of the charging order and the order for sale.

With reference to the charging order counsel for the solicitors, who obtained it ex parte, takes the point that having been once made, although made ex parte, this Court has no jurisdiction to consider any application to rescind the order—that the only place where it can be considered is in the Court of Appeal. That appears to me to introduce something extremely novel, because all ex parte orders which affect the interests of other persons are

(1) (1872) L. R. 3 A. & E. 505, at p. 509.

(2) (1888) 20 Q. B. D. 693.

(3) [1893] 1 Ch. 709.

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subject to those other persons appearing and applying within a reasonable time to set them aside.

There is no doubt in my mind that this application can be made, and that the question to be considered is whether, having heard all the parties, the order ought to have been made. Further, it is admitted that the making of such an order is discretionary, and, therefore, I have to consider it really afresh in this case, having heard those who are affected by it. To my mind the matter is free from any serious doubt. There may be a question whether, strictly speaking, it can be said that the action of the solicitors in this case did preserve or recover property. I feel some doubt as to whether it did—as to whether or not the arguments in favour of the present application are not sound, that there is really no preservation of property in this case—but I do not think it necessary to decide the case upon that point at all, because there are others upon which one can clearly dispose of the matter. It may well be that, if there is a claim in the nature of a lien upon some property and solicitors are employed to defend against that claim of lien, saving the property from that lien, may — if this section of the Solicitors Act is construed liberally—be a preserving of the property, because it frees it from the lien, or frees it pro tanto from the lien; but in the present case the dates shew that for a long time after these costs were incurred, and this matter, so far as the interests of the plaintiff and defendants in the original action were concerned, was at an end—from November last, when the sum of 320*l.* was paid over and the ship was released—from that time until the month of June in this year the solicitors took no steps to enforce their claim or to obtain their charge. In the meantime the ship had passed from being the property of the original owners to being the property of the company, and although it may be that Mr. Wotherspoon was fully aware of all that had occurred, yet there is nothing to shew that he had present to his mind the fact that at the time of the transfer to the company and at the time of the mortgage there might possibly be some claim by the solicitors to have a charging order. Certainly the bank had no idea of any such charge or claim; but counsel for the solicitors contends that

it is quite immaterial whether the property had changed hands —whether any other persons acquired an interest in it before any application was made for a charging order—and that the charging order may relate back. It is an extremely novel doctrine, because there is no charge upon the property until application to the judge and a charging order is made by him. There is then only a discretion to make it, if the judge thinks it a fit case in which to make it. Yet it is contended that if, acting as a matter of discretion, the judge make the order, that order relates back and affects people who have bona fide acquired an interest in the property. I cannot take that view.

It appears to me that at the time this charging order was made the vessel was not the property of the person or persons on whose behalf the suit was originally defended. It had become the property of the company, and it had become subject to a mortgage granted without any notice at the time to the mortgagees of anything affecting their rights. The matter, therefore, was one in which I do not think there was any power to make the order which has been made. Certainly, if that is not the correct view to take, it was not an order which ought in the exercise of judicial discretion to be made. If solicitors choose to wait six months, while other people acquire interests, they ought not to be preferred to those who acted bona fide in acquiring interests in such property. It must not be forgotten that here we are dealing with shipping property, and as regards the mortgagees they took from the registered owner and acquired their title in the proper way. There is no reason why they should not be preferred to persons who had let their rights, such as they were, sleep for many months. Therefore, in my opinion, the charging order should be set aside, and also the order for the sale of the barque. That leaves the mortgagees and the owners free from the charging order. The application will be allowed, with costs against Messrs. Lightbound, Owen & Co.

On appeal:—

Nov. 10. *Leslie Scott*, for the appellants, Lightbound, Owen & MacIver. The facts are not in dispute, nor is it now contended that the charge in respect of the solicitors' costs takes

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priority of the mortgage; but in respect of the sum of 304*l.* 17*s.*, being the difference between the amount of the plaintiff's claim in the action for wages and disbursements and the amount actually recovered by the plaintiff, it is contended that, to that extent, property of the defendants was preserved in respect of which the charging order was properly made, the property being, at the time the costs were incurred, under arrest, and therefore under the control of the Court. It may be that the order is not drawn up quite in the usual form, but any amendment suggested by the Court will be accepted.

The change of ownership resulting from the transfer of the *Birnam Wood* by John Wotherspoon to the ship company was made without the knowledge of his solicitors, and, as the limited company was practically John Wotherspoon, the company would be affected with notice of the indebtedness of the vendor to his solicitors in respect of matters concerning the vessel. There was no delay in applying for the charging order, for the correspondence shews that John Wotherspoon was making promises of payment, and, when it was ascertained that he had left the country, the application was promptly made. It is true that, by mistake, the present owners of the vessel were not served with notice of the application for a receiver and for the sale of the vessel, but this order was consequential on the charging order, and was only applied for owing to the refusal of the Birnam Wood Ship Company to consent to notice of the charging order being entered on the ship's register, and, except so far as it appointed a receiver to intercept the freight which John Wotherspoon had gone abroad to collect, it was so worded as to be inoperative until a further application should be made.

It is submitted that the learned judge in the Court below had no jurisdiction to discharge the order, and that if he had jurisdiction he ought not to have exercised his discretion by setting the order aside. It is not correct to say that, the sale to the company having been effected before the charging order was applied for, the sale has priority. The company is not in a position to contend that they are bona fide purchasers without notice, for they must be held to have had constructive notice, through John Wotherspoon—who was both vendor and promoter

—of the liability of the vendor to his solicitors for unpaid costs: see *Faithfull* v. *Ewen* (1), where the mortgagees, having notice of the suit, were held, on appeal, to be postponed to a subsequent charging order. All that is necessary to affect the company with notice is that they should have notice of the solicitors' right to a lien. The provision in s. 28 of the Solicitors Act, 1860, avoiding conveyances made to defeat a charging order, "unless made to a bona fide purchaser for value without notice," means without notice of the solicitors' right to a lien, and not without notice of the existence of a charging order: *Cole* v. *Eley* (2); see also the observations of Lord Halsbury as to the duty of the general manager of a company receiving notice in *Salomon* v. *Salomon*. (3) The case comes within the principle laid down in *In re Hampshire Land Co.* (4), that the knowledge which an officer of one company has acquired will be imputed to the other company of which he is also an officer if he has a duty imposed on him to communicate his knowledge to the company sought to be affected by the notice; see also as to the duty of promoters of a company: *Erlanger* v. *New Sombrero Phosphate Co.* (5)

Dawson Miller, for the respondents, the Birnam Wood Ship Company, Limited, was not called upon.

COZENS-HARDY L.J. I think the decision of the President was correct, and it is hardly necessary that I should add anything to his judgment; but perhaps it is right I should state the facts which influence me.

An action was instituted by the captain against the ship on June 22, 1905. It ended in judgment for a sum less than was claimed by the plaintiff, the difference being a sum of about 300*l.*; and it is said—and I assume for the purposes of the present decision that it is correctly said—that to that extent the defendants' solicitors preserved the res, that is, the ship which was at that time under arrest. I do not decide that, but I assume it for the purposes of my decision to-day. The ship was

(1) (1878) 7 Ch. D. 495.
(2) [1894] 2 Q. B. 350.
(3) [1897] A. C. 22.
(4) [1896] 2 Ch. 743.
(5) (1878) 3 App. Cas. 1218.

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released from arrest on November 29, but the solicitors for the defendant did not send in their bill of costs to their client, John Wotherspoon, till February 7, 1906. In the meantime Wotherspoon, who was the registered owner of all the shares in the ship, had transferred her for a valuable consideration to a limited company. That was in December, 1905, and that limited company executed a mortgage in favour of Parr's Bank, which was also registered in December, 1905. The solicitors, who sent in their bill of costs on February 7 to Wotherspoon, allowed it to remain unpaid, after they knew that the ship had been sold and a mortgage executed, and it was not until June 15, 1906, that they applied to the learned judge of the Admiralty Division for a charging order. They applied ex parte, and I think it right to say that in my judgment no such order ought, unless in very exceptional circumstances, to be made ex parte. That principle has been laid down emphatically by this Court in appeals from the King's Bench Division, where ex parte orders for a receiver at one time were habitually made in chambers. I have the sanction of the Master of the Rolls for saying that he thinks the same principle should be applied in Admiralty cases.

Well, the order was made. I do not pause to say more than that the order was, it seems to me, wrong in form and bad in substance. After it had been made there was an application for a receiver of the freight, and an order was made, again without any service or affidavit of service on the then owners of the ship, appointing a receiver and ordering a sale of the ship, but at the same time proceeding to add words which rendered the order for the sale wholly inoperative at that stage. On August 8 an application was made by Parr's Bank, the mortgagees, to discharge the charging order, and the order for a receiver and sale. That, after adjournment, came before the President last month, and he discharged the order for a charging order, and the consequential order for a receiver and sale, on grounds which seem to me to be amply sufficient for the purpose.

This is a discretionary jurisdiction, and the Court must, of course, have regard to all the circumstances and the conduct of

the parties. It is almost, if not quite, conceded that the order cannot be supported if we hold that the limited ship company was a purchaser for value without notice. A more accurate way to put that proposition would be to say that the order cannot be supported unless you are satisfied by the argument of the appellants' counsel and by the evidence that the limited company, being a purchaser for value, had notice of circumstances which might result in a charging order being made. I have heard nothing which leads me to arrive at that conclusion. It is called a "one-man company," which is taken, I suppose, more or less to be a term of abuse; but it is none the less a limited company, and I can conceive no principle whatever for holding that a limited company ought to be affected by knowledge or notice not of an existing charge, not of anything which it is to their interest they should know, but simply of this, that the vendor of the ship was in such a position, apparently, that after the bill of costs was delivered, two months later, he might then be unable to pay his bill of costs, and that six months after the sale of the ship to them an order for a charging order might be made. I think that really would be carrying the doctrine of implied notice to an extent which would be quite shocking and must interfere with honest and legitimate business dealings. If the purchaser of a ship was bound to ask his vendor these questions, "Your ship was arrested a year or so ago and has now been released, may I ask you if you have paid your bill of costs? It has not yet been delivered. When it is delivered will you be able to pay?" I think it is easy to say what the answer would be. I think the judgment of the learned judge was perfectly correct, and for the reasons he gave. The appeal must be dismissed with costs. The Master of the Rolls has been obliged to go away on public business, but he desired me to say that he had come to the same conclusion.

FARWELL L.J. I agree, and I might well be content to rest the matter upon the ground that the learned President exercised his discretion in a way which seems to me correct, but, in deference to the ingenious arguments of counsel

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for the appellants, I wish to state my views upon two points only.

In the first place, I think that an order for a charging order under the Solicitors Act, 1860, ought not to be made ex parte It never is so made in the Chancery Division, and I see no reason why the same principle should not apply in other Divisions. I do not say that there is no jurisdiction to make these orders ex parte, but it ought not to be done except under very special circumstances. Apart from real estate, which is not now in question, the Act merely gives a discretionary power in aid of the common law lien which is not affected by the Act: *In re Born.* (1) Whether the solicitor has or has not lost or parted with this lien, the Court ought not to interfere either to aid it or to supply a substitute for it without hearing the other side.

The second point is this: It has been pressed upon us that the limited company must be fixed with constructive notice of the liability of the promoter of the company for his solicitors' costs; and the case of *Erlanger* v. *New Sombrero Phosphate Co.* (2) has been cited; but in that case the company claimed rescission of a contract against their vendor on the ground of the fiduciary relation in which he stood to them and the duty arising therefrom to make a full disclosure. This is very remote from the present case, where it is sought to fix the company with a liability on the footing that the vendor must be deemed to have disclosed the possibility of an inchoate charge, or that if he did not, the company were guilty of gross and culpable negligence in not ascertaining it. The Courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever. It is extravagant to assume that this man Wotherspoon would have said anything whatever to the company about his unpaid bill of costs, though I do not think it is necessary to impute any dishonest design to him at all. The solicitors were not without their remedy. They could have acted sooner. They could have proceeded against Wotherspoon immediately the action was at

(1) [1900] 2 Ch. 433. (2) 3 App. Cas. 1218.

an end. In my opinion the learned President was quite right, and the appeal must be dismissed with costs.

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Solicitors for appellants: *Charles Russell & Co., for Lightbound, Owen & MacIver, Liverpool.*

Solicitors for respondents: *W. W. Wynne & Sons, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for interveners: *Batesons, Warr & Wimshurst, Liverpool.*

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Admiralty—Salvage—Agreement—Position of Ship's Agent.

A large steamship belonging to the defendants, laden with sugar from Java to Port Said for orders, was coaled at Colombo by the plaintiffs, who acted in the usual way as ship's agents. A few days afterwards the vessel grounded on Gofar Island in the Maldives and remained fast. Her master sent the chief officer back to Colombo with a letter to the plaintiffs acquainting them with the situation, telling them that he wanted a powerful tug, asking them to give the chief officer every assistance, and to draw on the defendants, the owners of the ship, for disbursements. He also suggested that a contract for a salvage boat, "No cure, no pay," might be advisable. The plaintiffs, being of opinion that no satisfactory arrangement of the latter kind could be made, engaged a Government tug at a rate working out at about 60*l.* a day, and, making themselves personally liable for the payment of the hire, insured the tug for a limited period. The tug proceeded to the vessel with a representative of the plaintiffs on board. The master, doubting whether his vessel could be got off, declined to accept the services of the tug except on a "No cure, no pay" agreement, and accordingly, after some discussion with the plaintiffs' representative as to terms, the master signed a letter agreeing on behalf of the defendants to pay the plaintiffs 4000*l.* if the vessel was successfully floated. The tug then made fast, and, in the course of the next day's towage, the vessel came off. The plaintiffs claimed 4000*l.*:—

Held by Sir Gorell Barnes, President, that the agreement could not be given effect to consistently with the equitable principles guiding the Court in salvage cases, that is to say, the plaintiffs could not, in the circumstances, be allowed to ratify the act of their representative, as they were not salvors at all, but, in engaging the tug, had acted as

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agents of the ship, and as such they were only entitled to recover by personal action repayment of their disbursements, together with the usual agency charges.

ACTION OF SALVAGE.

The plaintiffs were Clarke, Young & Co., general merchants and coaling agents at Colombo, Ceylon.

The defendants were the Eskside Steam Shipping Company, Limited, of Whitby, owners of the *Crusader*, and the owners of her cargo.

The case is reported on the question of the principle upon which the Court will act in refusing to give effect to a salvage agreement made by a ship's agent with a ship master.

On August 5, 1905, the *Crusader*, a steel screw steamship of 4210 tons gross register, from Java to Port Said, for orders, with a cargo of 6000 tons of sugar, called at Colombo, and was supplied with coal by the defendants' contractor, the Colombo Coaling Company, through the plaintiffs, who acted in the usual way as the ship's agents, and who would be reimbursed in the ordinary way by master's drafts. On August 7, about 9.15 P.M., the vessel went ashore on Gofar Island in the Maldives. Soundings were taken which shewed that she had run on a coral reef and was lying in sixteen feet of water forward, increasing rapidly aft with her stern in deep water of over 200 fathoms. She was leaking in No. 1 tank and in the port bilge, but the water was kept down with the donkey pump. Attempts were made to back the vessel off by working the engines astern whilst jettisoning cargo forward, but the vessel remained fast. On the following day an anchor was run out from the port bow and dropped as far aft as possible, and at high water the anchor was hove upon by the winch to assist the engines but without success. On the morning of the 9th the anchor carried away, and the vessel afterwards sagged round with her starboard side towards the reef and lay with a list to port. The chief officer was then sent to Mali Island in order to obtain a junk from the Sultan of the Maldives, in which to proceed to Colombo for a tug. The work of jettisoning was continued with the help of native labour. On August 11 the chief officer returned with the junk, and later on the same day was sent

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by the master to Colombo with the following letter, dated the same day, addressed to the plaintiffs, and delivered by the chief officer to the plaintiffs on the morning of August 15.

"Dear Sirs,—This will introduce to you Mr. Milburn, chief mate of the *Crusader*. Kindly give him every assistance and draw for disbursements on my owners. The *Crusader* ran ashore here the night of the 7th instant. I am jettisoning cargo forward, but as the reef is so steep, having under the stern of the steamer over 200 fathoms water and forward only sixteen feet, I can make no use of the anchors, having lost already stream anchor and new wire rope. I require a good powerful tug. The Sultan of the Maldive Islands has kindly promised me assistance as to labour, but that alone will not get the steamer off as the current sets on the reef, and as we lighten so we drive further on. A salvage boat would be of assistance, on the principle of no cure no pay. I will probably be able to make better terms here than you can at Colombo with salvage boat when he sees the situation. So far she is only leaking slightly in fore peak and No. 1 tank. Please inform Lloyd's agents. My chief officer has telegram and letter for my owners, which please forward. Despatch of tug is of the utmost importance, so do not delay." [Then he asked about a dry dock or pontoon at Colombo, and added] "Send me also 500rs. by chief mate to pay labourers for lightening and pumping at fore peak."

The plaintiffs telegraphed on August 15 to the defendants, the owners of the *Crusader*, "Your interests have our attention," and, after consulting with Lloyd's agents at Colombo, they hired the Government twin screw tug *Goliath* according to a tariff at the rate of Rs. 750 per day with certain extras for water, extra men, ropes and other salvage appliances, and insured the tug for fourteen days (to be extended if necessary), for 15,000*l.* at 1 per cent. premium. On August 16 they informed the defendants by letter of these arrangements, and that the estimated daily expense of the tug would be about 60*l.*, exclusive of agency fees. On the same day the *Goliath* left Colombo with the chief officer and C. T. Young, a clerk of the plaintiffs, and the extra hands on board the tug included a navigating officer in addition to the master. On the morning of the 19th the tug arrived alongside

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the *Crusader*, when C. T. Young went on board. The vessel was in the same position, but a large portion of her cargo had been jettisoned. A discussion then ensued with the master as to the arrangements made by the plaintiffs for the hire of the tug, and the master, under the impression that his vessel could not be got off, refused to accept the services of the tug except on the basis of "no cure, no pay." The master offered 3000*l.*, which was refused by C. T. Young, who suggested 5000*l.*, and ultimately the following letter addressed to C. T. Young, as representing the plaintiffs, was signed by the master:—

"This is to certify that I as master of this ship and on behalf of my owners, the Eskside Steam Shipping Company (Limited), Whitby, have this day agreed with you to pay Messrs. Clarke, Young & Co. (on the no cure no pay system) the sum of 4000*l.* if you succeed in floating the *Crusader* and see her safely into the nearest port if required. In the event of your doing so payment to be made by draft on my owners. It is, of course, understood that should you not succeed in floating this steamer I am to pay you nothing."

C. T. Young then returned to the tug and informed the crew that a salvage agreement had been entered into by him, and that they would be specially rewarded if successful.

About noon the *Goliath* made fast, but during a short towage the rope twice broke, and the *Crusader's* propeller was fouled. By the time the propeller was freed it was getting dark, and the tug, refusing to work at night, waited till daylight, though jettisoning was continued from No. 4 hold all night, and the ballast tanks were filled to keep the vessel in place. At 7 A.M. on the 20th the *Goliath* again made fast, and kept a strain on the rope to prevent the vessel from sagging further on to the reef whilst cargo was being jettisoned from Nos. 3 and 4 holds. At 2.30 P.M. all the ballast tanks were pumped out and the tug began to tow full speed, the *Crusader* also working her engines astern. At 3.10 P.M. the after part of the *Crusader* came clear of the reef. The after peak and Nos. 4 and 5 ballast tanks were then filled to raise the vessel forward. About 3.50 P.M. the tow-line broke, but by 4.15 P.M. was again made fast, and towing was resumed, with the result that, about 5 P.M., the *Crusader* came off

the reef and was towed clear into deep water. She subsequently put back to Colombo under her own steam, arriving there about 6.30 P.M. on August 22, the tug having preceded her by a few hours. On August 23 the plaintiffs telegraphed to the defendants that the *Crusader* was floated, and informed them of the salvage agreement and asked for confirmation. After a second telegram the defendants, on the 25th, replied asking for an explanation, and on the 31st telegraphed that they declined to recognize the salvage agreement, and confirmed the original arrangement made on their account in respect of the tug. The letters of the master of the *Crusader* explanatory of his view of the matter are sufficiently referred to in the judgment.

The value of the *Crusader* in her damaged condition was 27,000*l.*, and that of the portion of her cargo which was salved 30,500*l.* The gross freight payable on delivery was 6013*l.*; but the expenses of the voyage subsequent to the services, including the expenses of putting back to Colombo and discharging, and proceeding to Bombay to repair, and thence back to Colombo to reload, and afterwards to Liverpool, the substituted port of discharge, exceeded the amount of the freight.

The plaintiffs claimed 4000*l.* under the agreement, or, alternatively, such an amount of salvage as might to the Court seem just, and, pursuant to an order of the registrar, delivered the following "particulars of expenses":—

Insurance of tug *Goliath*, Rs. 2269.25; hire of tug, Rs. 7836.50; messing charges of C. T. Young and the chief officer of the *Crusader*, Rs. 50; expenses of plaintiffs' representative to Maldive Island, Rs. 300; total, Rs. 10,455.75, or 697*l.* 1*s.* By further particulars, delivered pursuant to order, the plaintiffs stated that "The agreement for the hire of the tug *Goliath* was made verbally between Mr. Clarke, jun., of the plaintiff firm and the acting master attendant and made by the plaintiffs as principals."

The defendants denied that the plaintiffs had rendered any salvage service to the *Crusader*, her cargo and freight, and denied the plaintiffs' right to maintain the action. Alternatively, whilst denying liability, the defendants brought into Court the sum of 500*l.* as salvage, as well as the sum of 697*l.* 1*s.*, being the

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disbursements mentioned, and said that these sums, amounting together to 1197*l.* 1*s.*, were sufficient to satisfy the plaintiffs' claim, if any, in the action.

Aspinall, K.C., and *C. Robertson Dunlop*, for plaintiffs, Clarke, Young & Co. The master of the *Crusader* required a powerful tug to prevent his ship becoming a total loss, and the plaintiffs accordingly chartered the *Goliath* from the Ceylon Government on terms which rendered them personally liable for the amount of the hire, and personally responsible for the safe re-delivery of the tug and her gear to the Government. When the tug arrived the master of the *Crusader*, having apparently made up his mind that the vessel could not be got off, insisted upon throwing upon the representative of the plaintiffs the whole risk of the expenses connected with the tug, and, accordingly, a "No cure, no pay," agreement was entered into. The result was that the master allowed the tug to make fast and the vessel came off the reef. It is submitted that, in the circumstances, the master had authority to bind his owners, and that the plaintiffs having ratified the action of their representative the transaction was complete, the repudiation by the defendants coming too late. The plaintiffs undertook a very great responsibility, incurred considerable expense, and waived all their antecedent rights to payment for work done as agents. The sum of 4000*l.* was, considering the critical position of the ship, not unreasonable. In *The Kate B. Jones* (1) the defendants, the owners of the ship in distress, wired to the ship's agents, "If possible, make all agreements no cure no pay," but the ship's agents were held not to be precluded from claiming as salvors.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Crusader* and of her cargo. The letter of the master delivered to the plaintiffs by the chief officer requested them to hire a tug and authorized them to draw upon the owners of the ship for disbursements. The plaintiffs acted upon the letter, and it thereupon became their duty as agents to use their best endeavours to protect the interests of the

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defendants, and to procure towage assistance on behalf of the defendants upon the best terms they could. For this purpose no ratification by the defendants was necessary. It is submitted, therefore, that the plaintiffs cannot, in this action in rem for alleged salvage services, recover the 4000*l.* claimed or any other sum. They were not volunteers, and neither the master of the *Crusader* nor the plaintiffs' representative had any authority to alter the liability of the owners of the vessel and enter into a fresh agreement of a salvage character. The Court will not give effect to the agreement, that is to say, the Court will not allow the plaintiffs to ratify it. The plaintiffs ran no risk in rendering the alleged services, their liability, if any, in respect of the salving property being covered by the insurance of the tug, for which they paid by way of premium 150*l.* The defendants are and always have been ready and willing to pay the plaintiffs the amount of their disbursements, including the insurance premium, and the amount paid for the hire of the tug, together with the usual agency commission on a proper account being presented to them.

Dunlop, in reply.

SIR GORELL BARNES, PRESIDENT. The facts in this case are somewhat out of the ordinary run of salvage cases, and require some consideration in stating them. The claim is brought by Messrs. Clarke, Young & Co. against the *Crusader*, her cargo and freight, for a sum of 4000*l.* under an agreement, and alternatively for such an amount of salvage as may to the Court seem just. The facts which it is necessary to state seem to be these. [The learned judge summarized the facts already set out, and, after reading the master's letter of August 11, continued:—] On receiving the master's letter the plaintiffs went to the Government at Colombo and hired the tug *Goliath*, which belongs to the Ceylon Government, and is, as I understand, one of two tugs sent out for the Government to be of service to vessels in those waters and to do towage work. The bargain they came to is expressed in the terms of the tariff charges for the use of the tugs for extraordinary services, namely, "Hire of one tug per day of twenty-four hours or part of a day, inclusive of coal, Rs. 750.

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Other charges: Water at the rate of Rs. 2.50 per ton; extra men at the rate of Rs. 2 per day each." There was also a provision that the vessel should be insured by the person hiring the vessel, and that all gear, ropes, &c., damaged, should be replaced at the expense of the hirer. So that when the plaintiffs hired that tug they hired her upon the terms of paying the Government moneys which amount, I understand, to 60*l.* per day, and they became personally responsible for that payment. The tug then proceeded to the vessel with a Mr. Young, who is a clerk in the plaintiffs' firm, on board. When they got to the *Crusader* the master of that vessel seems to have felt difficulty about accepting the services of the tug without making some further bargain. Upon that point I shall have to say something. The ultimate result was that on August 19 he signed a letter, which represents what was agreed upon between him and Mr. Young, the clerk of the plaintiffs. [The learned judge read the letter of August 19 already set out, and continued:—] Thereupon the tug on the afternoon of that day and again on the afternoon of the 20th rendered towage services to the *Crusader*, and she came off the reef, and went under her own steam, as I understand, to Colombo. There the matter, so far as this question of salvage is concerned, ends.

Now, the point taken for the plaintiffs is that they are entitled to this sum of 4000*l.* The defendants contend that the plaintiffs are not entitled to recover any salvage at all, neither the sum of 4000*l.* nor any sum, and that all they can do is to maintain a personal action against the owners of the ship for the amount of their disbursements, together with a commission upon such disbursements, because, they say, the plaintiffs were only acting as agents, and had no right in the circumstances to recover anything more than their out-of-pocket expenses, plus a commission.

There are one or two letters and telegrams which bear upon these points more specifically. The first letter is one from Clarke, Young & Co. to the master of the *Crusader*. I think it was taken out by Mr. Young, the clerk I have mentioned. In it they say: "We send you as requested Rs. 500 by the chief mate. The tug we have chartered is the only one available, and is owned

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by the Ceylon Government. There is little chance here of assistance on the 'no cure no pay' principle. We have also wired your owners to-day, stating that their interests have our attention and that a tug is proceeding to your assistance." On the same day they forwarded a telegram from the captain to his owners, which is referred to as having been sent, and they also telegraphed to the owners as follows: "Your interests have our attention, will wire again." On the same day they wired: "A tug will proceed to her assistance to-night." On the 16th they wrote a letter to the owners which contained these passages: "The captain requested us to send him a good powerful tug. We have accordingly chartered from the Ceylon Government the *Goliath* and despatched her to the scene of the accident this morning soon after 8 o'clock. She should reach the *Crusader* at daybreak on the 18th inst. Our representative, Mr. C. T. Young, left by the tug with letters of introduction to the Sultan of the Maldives and others in case of need. Mr. Young will consult with Captain Brown and your interests will have our best attention. Lloyd's Agents were immediately advised of the disaster." Then they talk about the pontoon or dry dock, and of having sent Rs. 500 to the captain. The postscript to the letter is as follows: "The cost of hiring tug inclusive of coals is Rs. 750 a day or part of a day, and there are other charges, such as water and extra crew, which we estimate will bring the daily expense of the tug up to about 60*l.* sterling. Any damage to ropes has to be made good by hirers of the tug. We have also had to insure the tug for 15,000*l.* for fourteen days at 1 per cent. Agency fee, i.e., commission on disbursements, has not been included in above figures." There is nothing else that I need refer to until August 22, when this telegram was sent from the plaintiffs to the defendants: "Tug floated *Crusader*. About half cargo jettisoned. Expected Colombo to-night. Salving agreement made for 4000*l.* Will wire again." On the next day a further telegram was sent, saying: "We refer to our telegram of yesterday. Confirm by telegraph salvage agreement made for 4000*l.*" The owners and the Salvage Association in this country wired asking for an explanation. The telegram from the defendants, dated August 27, is as follows: "Wire explanation

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why salvage agreement was made by captain with Government tug when engagement was 60*l.* day. Owners and underwriters decline confirm. Retain possession cargo. Keep the sound separate from that which is damaged." A further telegram from the owners, sent on September 1, reads thus: "Referring to your salvage claim 4000*l.*, we decline to recognize same, and can only confirm original arrangement made by you on our account with Government tug." I think that completes the documents it is necessary to refer to, with the exception, perhaps, of one letter from the master, to which I wish to draw attention later.

It seems to me to result from this statement of facts that the plaintiffs acted as agents for the owners in making the arrangements with the Government for the use of the tug. I think that the evidence which has been given in the depositions, and viva voce, makes it quite plain that that was the position of the plaintiffs, and that the postcript to the letter commencing "the cost of hiring tug" and ending "agency fee, i.e., commission on disbursements has not been included in above figures," makes it perfectly plain. I do not think that the arguments that have been addressed to me have differed from that view of the case at the outset. That being so, the position of the two parties was this, that the plaintiffs had made themselves responsible to the Government for the hire of the tug, and would have a right to recover whatever they paid to the Government from the owners of the ship, and in the ordinary course would, as indicated in the letters, have drawn for it and charged commission on the disbursements. I think that is also in accordance with the wishes of the master and the authority for the plaintiffs to act which they derived from him, contained in the letter of August 11. The authority to act upon that letter was accepted by the plaintiffs when they wrote to the master the letter of August 15, to which I have referred. That being the position, the liability of the owners of the ship seems to me to have become complete, and the bargain between the parties to have been definitely fixed. Of course that leaves for consideration what the position was when the tug arrived at the Maldive Islands, and when the alleged agreement sued upon was made. At that moment I

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think it is clear from what I have stated that Mr. Young, the clerk, was going out as the representative of Messrs. Clarke, Young & Co., the plaintiffs, to carry out the bargain which had already been made for the employment of the tug, and my opinion is that he had no authority whatever from his principals to alter that bargain so far as they were concerned, because if he did so in such a manner as it is contended he has done, he was placing them in a position of having no remedy for the expenses they had already incurred against the owners of the ship should the ship not be salved. That would not necessarily dispose of this point, however, because his principals could ratify his action if they chose, and say: "Although you may not have acted with proper authority from us to destroy our rights for the liability we have incurred against the owners, we will ratify what you have done and now sue under the contract." So there is a difficulty in saying this case is disposed of simply on the ground that Mr. Young had no authority to make that bargain. I do not think that at the time he made it he had any authority to act in the way he did. I do not say for a moment that he was acting with any want of bona fides. He did the best he could in the situation. What was the situation? The master of the vessel, apparently, would not accept the tug when she got there on the footing on which she had been engaged, and what he says in one or two of his communications to his owners is this (telegram of August 28): "Your telegram received. All interests are cared for. . . . . Confirm salvage agreement made with collieries' representative 4000*l.*, no cure no pay. I insisted make agreement, considered best interests all concerned rather than allow tug work indefinitely, possibly no results. I consider the demand very moderate considering risks." He practically maintains the same position in subsequent letters, but there is one which may perhaps be used as shewing his more elaborate view of this matter: "I have very little to add why I made a salvage agreement. The honest truth is, I never expected her to come off. The chief engineer and self knew a rock was working itself through above a plate in engine-room. . . . . I offered Mr. Young 3000*l.* at first, but as he pointed out to me that he should have to pay large bonuses to the two masters first and

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engineer in the tugboat, and the risk his firm ran if he was not successful, it was then increased to 4000*l.*, and I firmly believe without a salvage agreement she would not have come off." That is why Mr. Young made this salvage agreement. The master practically insisted upon it.

The question then comes to be whether the agreement can stand, in other words, whether the salvage claim put forward can be based upon it. There is one well-known principle in this Court, viz., that salvage is a reward for services rendered, not exactly on the basis of any contract, but as a remuneration on public grounds for services rendered to vessels or other property in distress. From that are deduced certain well-known principles. Amongst them is the principle that the Court will not enforce an agreement—or not give effect to it is the proper way to put it—and will not base its salvage award upon an agreement if the circumstances are such that it would not be just and equitable that it should do so. So it seems to me that the principal matter to consider in this case is what is the duty of the Court, and what are the rights of the parties, having regard to those principles. In this case I do not think that question presents any serious difficulty. In the first place, the position of an agent must not be left out of consideration. I held in one case that has been cited, *The Kate B. Jones* (1), that an agent is not precluded from being a salvor, though his position affects to some extent the question of what his precise reward and rights are. I do not desire here to repeat anything I have said in that case, and I do not think counsel questioned in the argument before me anything that that case laid down.

The next matter to consider is that the vessel in this case was in a dangerous position, and it may be—I am not going into that question—that if an independent salvor had been procured, and he had proceeded out and rescued this vessel—it may be that the sum which was agreed upon would not have been thought excessive, though to my mind there is considerable doubt about that, having regard to what had been done with the vessel by the time the tug got there. That, however, is not the situation in this case. When the tug arrived she reached the

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vessel under a binding bargain that her services were to be used for 60*l.*, or thereabouts, per day, and so if the master in this case had viewed the situation with anything like ordinary average intelligence he would have seen that he could use that tug for a day or two for a very small sum, 120*l.*, or 180*l.* for three days, and could thus have made certain whether by the efforts of the tug alone, as the *Crusader* lay there, having discharged some of her cargo, he could get her off. The view I take, and the view the Elder Brethren take, is that it was an absolutely outrageous bargain for the captain to attempt to make, and that he was acting in an extremely foolish way. I cannot follow the reasoning in his letters which led him to take that course, unless it was this, that he did not realize that he was entitled to use the tug for 60*l.* per day for as long as he chose. I cannot myself believe —because he is stated to be an intelligent man—that he thoroughly grasped or was adequately informed of the position which that placed him in, because it is so obvious that a trifling expense would have enabled him to see whether he was going to get the ship off or not, and he could have waited and then made his big bargain if he thought it necessary. That being so, even if the agent has had his act ratified, and acted quite straightforwardly in making the contract with the master, who was insisting upon it at the time, I do not think this Court can allow the plaintiffs to ratify and adopt that act so as to give them a right to bring a salvage claim based upon it. To my mind their rights rest where their bargain originally was, to get their disbursements from the owners of the vessel and charge them also a proper and reasonable commission on the disbursements for the work done. Is not that really the right—the meritorious—result in this case? What have the plaintiffs done except that which they undertook to do when they acted on the captain's message, sent through the mate? They have done nothing whatever, except make a bargain for a tug, and they were content when they made that bargain to undergo liability to pay for the tug, provided they got adequate remuneration in the shape of commission.

In my opinion the plaintiffs are endeavouring to enforce a claim which in the circumstances the Court will not allow them

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to maintain. My judgment must be for the defendants in this case, with costs, but costs will be subject to counsel for the defendants agreeing—and I understand they do agree—that the plaintiffs shall take out of Court the sum of 697*l.* paid in for disbursements, and also undertake on behalf of the defendants to pay the necessary agency commission, which I will fix at 5 per cent., and the plaintiffs will be allowed their costs of the application for a commission to take evidence in Colombo.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Botterell & Roche.*

T. L. M.

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Admiralty—Collision—Fog—"Navigate with Caution until Danger of Collision is over"—Regulations for Preventing Collisions at Sea, 1897, *art.* 16.

Those in charge of a steam vessel, proceeding at night at slow speed on account of fog, stopped the engines on learning the proximity of another steam vessel by the sound of her whistle, the bearing of which was taken by compass and made out to be a point and a quarter to a point and a half on the port bow, and estimated to be at a considerable distance. Whilst the vessel was losing steerage way and falling off her course the sound of subsequent whistles apparently broadened a point. The engines were then put dead slow ahead to get steerage way and bring the vessel back to her course, and so continued for some twenty minutes, during which time, although the sound of the whistle was getting closer, it was estimated to have broadened so as to be about four points on the port bow. A collision occurred:—

Held by Sir Gorell Barnes, President, that, as in fog the estimated bearing of sound signals cannot be relied on, there was no sufficient ground for assuming that the sound of the whistle was broadening to such an extent as to justify continuing on for twenty minutes without stopping from time to time, and, therefore, there had been a breach of the 2nd paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, by which "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Action of Damage by Collision.

The plaintiffs were the owners of the *Oakmore*, a steel screw

steamship of 4547 tons gross register, engines of 450 horse-power nominal, and a crew of thirty-nine hands, on a voyage from Antwerp to Boston with cargo.

The defendants and counter-claimants were the owners of the *Aras*, a steel screw tank steamship of 3610 tons gross register, with triple-expansion engines of 270 horse-power nominal, and a crew of thirty hands, on a voyage from Batoum to London with a cargo of petroleum.

The casualty occurred at night during a fog in the neighbourhood of Portland Bill in the English Channel, and the case is reported on the question of the meaning to be attached to the words "and then navigate with caution" in the 2nd paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, 1897. (1)

The material facts are fully set out in the judgment, and the arguments of counsel are also there sufficiently referred to.

Nov. 27, 28. *Aspinall, K.C.*, and *Lewis Noad*, for the plaintiffs, owners of the *Oakmore*.

Pickford, K.C., and *D. Stephens*, for the defendants, owners of the *Aras*.

Nov. 29. SIR GORELL BARNES, PRESIDENT. This is a case of a collision which took place on July 23 last, at a spot about which there has been some dispute, in the English Channel, between the steamships *Oakmore* and *Aras*. The time, according to one side, was 1.49 A.M., and according to the other 1.30 A.M., The *Oakmore* was proceeding on a course of about N. 86° W. magnetic, at slow speed, because the weather was foggy. She was sounding her whistle, and those on board her were all at their proper stations. The *Aras* was steering N.E. by E. ¾ E. easterly magnetic, also at slow speed, because of the state of

(1) Art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

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the weather. She also was sounding her whistle, and those on board her were at their proper stations.

The case for the *Oakmore* is shortly this: That while proceeding in the way I have already stated those in charge heard a long blast on the port bow; that it was reported by two look-outs, one forward and the other in the crow's nest; and that thereupon the engines were stopped. The master then stated that he took a bearing by compass of the sound, and made it out to be W. by S.—that is to say, a point and a quarter to a point and a half on his port bow. That is, of course, pure estimate, because it means that he took the direction in which he believed he had heard the whistle and endeavoured to make out where it was by compass. Then, according to his evidence, which substantially states the case for the plaintiffs, he kept the vessel stopped until her steerage way was lost, and during that time heard the whistle of the other vessel about three times, and it broadened out, and after he had lost steerage way and was falling off his course the whistle was bearing W.S.W. from him; that he put his engines ahead dead slow to get steerage way and bring the vessel back to her former course, and proceeded on for something like twenty minutes, during which time, although the whistle was heard getting closer, it was broadening on his port bow and not narrowing; and that when he saw the two mast-head lights of the *Aras* 200 yards off they were bearing S.W. by W., while he was still on his course of N. 86° W. Then he stated that shortly afterwards he observed the *Aras* was rounding to port, as if way had just been given her, and that he put his engines full speed astern, gave three short blasts, and put his helm hard-a-port, but the *Aras* struck him on the port side forward with her stem, with the result that both vessels were damaged.

The case for the *Aras*, stating it shortly and substantially from the master's evidence, is that while proceeding on the course I have mentioned, at 1 o'clock in the morning, he stopped and took soundings and got thirty-five fathoms, small stones and sand; that at 1.10 he started the engines again dead slow ahead, giving a speed of two knots, and did not alter his course at all; that at 1.20 he heard a blast two points on his

starboard bow—again that must, of course, be an estimate—that he telegraphed to stop and the engines were stopped, and the whistle blown for several minutes; that he looked over the side to see whether the way was stopped and then blew the "stopped" signal of two long blasts with a second's interval between; and that then he heard the whistle of the *Oakmore* very close, and immediately rang the engines full speed astern and gave three short blasts, and when he saw, immediately afterwards, or practically at the same time, the masthead light of the *Oakmore*, he put the helm hard-a-port, but without effect, the *Oakmore* being only a length off and a point and a half on the starboard bow when he also saw the red light. He further stated that he hailed the *Oakmore*, that he was himself going full speed astern, but the collision took place. The parts of contact are not substantially in dispute, but the plaintiffs say that the angle of the blow was a right angle, or, if anything, slightly leading forward —their surveyor said it was a point leading forward—and the defendants saying it was a two and a half to three point angle, but their surveyor placing it at about a four-point angle. That is the whole story as presented on the two sides.

There is only one other matter to refer to. The place of the collision is not in agreement between the two sides, but both vessels were running by dead reckoning. The plaintiff's vessel had run from the Goodwin Sands without making any fresh point of departure. That was a very long distance away. The defendants' vessel had made nothing for certain since the Burlings, which was a still greater distance away. So, although it is probable that the place as given by the plaintiffs is nearer the truth, because their point of departure is somewhat the nearer, still I do not know that it can with certainty be said that the exact spot is given by either side.

Now, the case presents some difficulties, but I do not think when it is carefully considered that those difficulties amount to very much. I think that the case for the plaintiffs depends substantially upon their establishing three points. The first is that the whistle of the defendants' vessel was broadening as the two vessels approached each other. The second is that it is impossible on the plaintiffs' story to make the collision occur

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unless the defendants' ship starboarded at the last from a position estimated to be four and a half points or thereabouts on the port bow of the *Oakmore*. The third, which is almost involved in the second, is that, at the last, the *Aras* went at considerable speed from the position which I have just stated, and estimated in regard to distance to be something like 200 yards away when seen. I have to consider whether those three points are made out. With regard to the latter two, it seems to me that they are not established. It is clear that if the vessels were in such a position that those on board the *Oakmore* could see, as they say they did, the *Aras* bearing S.W. by W. from them at a distance of 200 yards, or anything like it, they must make out that the defendants starboarded, and kept starboarding hard without any really adequate reason for doing so; because, in the position thus described, it is almost obvious that the defendant vessel by a very slight port helm at that moment would have gone under the stern of the plaintiff vessel, and certainly would have no object whatever in coming at her at increased speed. With regard to one factor in the case which the plaintiffs rely upon as establishing what I think they have failed to establish, namely, the angle of the blow, I do not take the same view as was taken by the plaintiffs. I have said that they take the view, and endeavoured to prove, that the blow was at a right angle, or slightly leading forward. The defendants, on the other hand, say it was considerably less than a right angle. That is a point very much in dispute. Two very competent surveyors have been called on the respective sides, and they totally differ about it, and give their reasons, which are in complete conflict. As I have not seen the vessels it is very difficult to be certain which of them is right, but the view the Elder Brethren and I take about it is that if there was reversing of the engines of the *Oakmore* only at the last moment she would probably have some speed still on her; that there was undoubtedly exceedingly little speed, if any, on the *Aras;* that the damage is more probably to be accounted for by the stem of the *Aras* being swept over to port by the contact which took place; and that the damage was done very much in the way the defendants contend for. The result of that is that I cannot, and

do not, accept the view that the defendant vessel starboarded and came at speed or increased speed at the end. Before leaving that point it is to be remembered that although the plaintiffs' witnesses spoke of a right angle blow, yet the master of the plaintiff vessel admitted that the hard-a-port helm and reversing had canted the head of his vessel somewhat more to the northward, and an increase of the angle might be accounted for in that way. [The learned judge examined the evidence on this point, and continued:—] In face of that evidence and against the probabilities I cannot accept the view that the defendant vessel starboarded. I think she kept her heading, and was practically stopped in the water at the time of this disaster. I think it follows that the defendants' story is substantially true, that they were doing what they could to keep a proper look-out, that they stopped on the whistle being heard, and that they had practically run their way off when the vessel was seen, and that they then reversed their engines, but that there was no time to avoid the collision. The only difficulty about their part of the case is that they did not hear more than two whistles, one at the commencement and one almost immediately before the collision, but it must not be overlooked that sound, as is quite notorious, is a very difficult thing to be accounted for in a fog, and the wind was W.S.W., which was from the defendants towards the plaintiffs, and therefore adverse to the defendants hearing so well as the plaintiffs. I feel no difficulty in accepting the story of the defendants, and I cannot find that they were to blame in any way for this collision.

The case against the plaintiffs requires careful consideration. It depends, so far as their navigation is concerned, upon the first point which I have said it was necessary for them to establish. It depends upon whether the account given in Court of the whistles of the defendant vessel broadening continually from a point and a little more to four points or a little more on the port bow is correct. I think it almost follows from what I have already said about the bearing when the vessels were first seen that it cannot be correct. It is quite obvious that when this evidence was given a very strong attempt was made to make out this necessary feature of the plaintiffs' case. It is all very

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well to say that these sounds were gauged by compass with such certainty as their witnesses say, but that cannot possibly be accepted. One reason why I did not give my judgment yesterday was that I wished to see the two courses laid off with accuracy, in order to ascertain, knowing how the collision took place, whether that story could possibly be true. The Elder Brethren have been good enough to lay off for me the courses of the *Oakmore* and the *Aras*, and I have taken the position at which the plaintiffs state the whistle was first heard. It is almost obvious when the matter is thus laid out—I think it is quite obvious—that these two vessels must have kept almost upon the same bearing from first to last, approaching closer and closer no doubt, but certainly not broadening. If there is any doubt about that, it ought to be resolved in the opposite direction, namely, in the direction of the conclusion that the *Aras* was getting narrower on the bows of the plaintiff vessel, rather than broader. That is made absolutely certain to demonstration by laying it off on the courses and bearings of the vessels. That leads me to the definite conclusion that it is impossible there can have been this broadening spoken to by the plaintiffs' witnesses in this case. I think the case then turns on a question of nautical skill, which is for the Elder Brethren to determine, because of the provisions of art. 16. That rule requires a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, to stop her engines so far as the circumstances of the case admit and then navigate with caution until danger of collision is over. In consequence of that rule I have asked the Elder Brethren this question: "When the *Oakmore* continued on her course"—the explanation of that is that according to her evidence she stopped, and then, finding she was falling off, put her engines ahead again and brought herself on to her course and kept on for something like twenty minutes—"were the indications such as to shew to her master, distinctly and unequivocally, that if both vessels continued to do what they appeared to be doing they would pass clear without risk of collision?" The answer is "No." Then the Elder Brethren were asked by me, "What ought to have been done in those

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circumstances on board the *Oakmore?*" And their view is that she ought not to have continued on in the way she was doing, with that big steamer coming closer and closer and doing what I have already said, but that she ought to have stopped, it may be only from time to time, even at the risk of falling off somewhat, because, recollect, there is a sound signal to be given if a vessel is absolutely stopped; that even if it would not have been advisable to keep continually stopped, by a touch ahead from time to time she could have been kept sufficiently on her course and under control instead of going on for something like twenty minutes at slow speed. The only other matter to consider in connection with that—it is not necessary, really, when one has found the facts as I have done, but it is worth while saying something about it—is the possibility that a man in the position of the master of the *Oakmore* might have been mistaken in the view he took of the bearing and progress of the vessel, and the consideration of what his position would be then. I think it is exactly the same, because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this was undoubtedly, and is not justified in thinking it is broadening unless he can make sure of it. That is the view I entertain very strongly, because if it is well established that the direction is an uncertainty, it is no use trying to rely upon it as a certainty by saying you looked at the compass. That being so, I am of opinion that the plaintiffs' vessel broke the provisions of art. 16, and that if she had not continued her course in the way she did throughout those twenty minutes there would have been no collision. The *Oakmore* must be held to blame for the accident that has happened.

Solicitors for plaintiffs, owners of the *Oakmore: Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants, owners of the *Aras: Thomas Cooper & Co.*

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Admiralty—Collision—Crossing Rule—Crossing Ahead—Narrow Channel—Good Seamanship—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 22, 25, 27.

By art. 25 of the Regulations for Preventing Collisions at Sea, 1897, "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel," and, as a matter of good seamanship, the waterway between two opposite points, as for example the ends of breakwaters, together with so much of the adjacent water as is necessary for the navigation of the passage, should be treated as a narrow channel within the meaning of this article.

Action of Damage by Collision.

The plaintiffs were the Royal Mail Steam Packet Company, owners of the *Orinoco*.

The defendants were the North German Lloyd Steamship Company, owners of the *Kaiser Wilhelm der Grosse*.

The case is reported on the question of the application of art. 25 of the Regulations for Preventing Collisions at Sea, 1897 (1), to a narrow passage defined by two points, such as the ends of breakwaters.

The facts are fully set out in the judgment, but, in the absence of a chart, the following outline may assist in appreciating the situation. The collision occurred at night just outside the western entrance to the harbour of Cherbourg. The weather at the time was overcast with a south-westerly breeze, and the tide the last of the ebb, nearly slack water. The western entrance is about half a mile in width, and lies between the ends of two breakwaters approximately east and west, that to the west, the Fort Chavagnac, being unlighted. In respect of the navigation, the practice, according to the evidence of the plaintiffs, would seem to be for a steamship approaching from the north to make for the light on the eastern end of the opposite breakwater, the Fort de l'Ouest, keeping it on the port bow, and, by porting, edge off to starboard

(1) Art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

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as she gets near enough for those in charge to distinguish the unlighted end of the western breakwater, and then keep well to the starboard side whilst passing through the narrow passage formed by the ends of the two breakwaters. According to the same evidence a steam vessel coming out should, if necessary, by porting keep to her starboard side of the narrow passage, passing the incoming vessel port to port, and the main charges made by the plaintiffs in their statement of claim against the defendants were that the defendant vessel when coming out committed a breach of the crossing rule (art. 19) by failing, when she had the plaintiff vessel on her starboard side, to keep out of the way, a breach of art. 22 by crossing ahead, and a breach of art. 25 by failing to keep to that side of the west passage which lay on her starboard side. On the other hand, the main charges made against the plaintiffs by the defendants in their defence and counter-claim were that, in breach of art. 21, the plaintiff vessel ported instead of keeping her course, and, in breach of art. 27, disregarded the dangers of navigation and collision, by failing to wait until the defendant vessel was clear of the harbour. By their reply and defence to counter-claim the plaintiffs, in the alternative, set up the defence of compulsory pilotage, but abandoned it at the trial, and, in the result, the arguments of counsel were chiefly directed to the question of good seamanship.

Aspinall, K.C., and *C. Robertson Dunlop*, for the plaintiffs, the owners of the *Orinoco*. No evidence has been given of any practice for the incoming vessel to wait outside. On the contrary, the evidence of the French pilot for the harbour of Cherbourg on board the *Orinoco* has not been disproved. That evidence is to the effect that the practice is for both the vessel coming in and the vessel going out to keep to the right, that is to say, the crossing rule (art. 19) is seemingly, in the circumstances, inapplicable; and, even if it did apply, as crossing ahead is to be avoided (art. 22), the outgoing vessel having, in the circumstances of this case, the incoming vessel on her starboard side, would port to go astern of the incoming vessel, and the incoming vessel would, if necessary, port so as to give more room, with the result that they

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would pass port side to port side as if governed by the narrow-channel rule (art. 25), which is, in effect, the guiding principle in such a locality. The same question arose in *The Knaresbro* (1), which was a case of collision in the Great Bitter Lake forming part of the Suez Canal. The plaintiffs'

(1) On April 26, 1900, about 6 A.M., in fine clear weather, a collision occurred in the Great Bitter Lake, Suez Canal, to the southward and westward of the red buoy at the northern entrance of the dredged channel, between the plaintiffs' steamship *Moyune*, of 4646 tons gross register, which was leaving the canal and entering the lake bound south from Birkenhead to China and Japan ports with a general cargo, and the defendants' steamship *Knaresbro*, of 3101 tons gross register, proceeding northward and about to leave the lake and enter the canal in the course of a voyage from Moulmein to Port Said for orders, laden with a cargo of rice. Both vessels had canal pilots on board. The action was tried on November 9 of the same year (*The Knaresbro*, 1900. C., No. 1343) by Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, when the *Knaresbro* was found alone to blame "for wrongfully starboarding her helm and not porting it long before the vessels were in close proximity, and not passing the *Moyune* port side to port side, and not stopping and reversing before the collision; further, for taking no steps, or no sufficient steps, to stop and reverse her engines before the collision." The learned judge inclined to the opinion that the crossing rule (art. 19) did not apply, and with reference to art. 25 said: "If it is (applicable), then having regard to the positions, although prima facie the vessels may be crossing, still they would be crossing in such a place that it would be necessary for action to be taken to bring them within art. 25, and to pass each of them on the starboard hand of the channel. . . . . The Elder Brethren take the view (and I agree) that the place where the collision happened was a narrow channel within the meaning of art. 25 . . . . (for) where a collision takes place just outside what is a narrow entrance and at a spot where both vessels must act for each other, having regard to the narrowness of the channel, the one coming out and the other going in, and they meet at a point where their navigation is governed by the fact that one is to go in and the other is to come out from that narrow channel, it seems to us that that piece of water where they meet, although it may be a piece of open water, is governed by the rule applicable to the narrow channel. I do not think it is necessary to hold that in this case; but that is the view which I am inclined to take, so far as art. 25 is concerned; but even if art. 25 does not apply, I think that the same result is arrived at, and for this reason: The Elder Brethren advise me that, having regard to the spot where this collision happened, it was the ordinary and necessary course of navigation for both these vessels to act so as to pass port side to port side . . . . (that is) art. 27 would have its operation, and then if we start with the notion that

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down-going vessel was leaving the canal proper and entering the lake, whilst the defendants' vessel, going north, was about to leave the lake and enter the canal, and though it was not necessary to decide the case on the question of seamanship, the Court, on the advice of the Elder Brethren, distinctly inclined to the view that the crossing rule (art. 19) did not apply, and that the proper course was for each vessel, in accordance with, or in analogy to, art. 25, to treat the spot as a narrow passage and keep to her starboard side, and for that purpose to port so as to pass port side to port side. That is what the *Orinoco* did do and the *Kaiser Wilhelm der Grosse* failed to do, and, therefore, the defendant vessel is to blame, the question involved being one of good seamanship, having regard to the locality.

Pickford, K.C., and *Hugh C. S. Dumas* (*D. Stephens* with them), for the defendants, the owners of the *Kaiser Wilhelm der Grosse.* The plaintiffs have thrown over the case they set up in their pleadings. By their preliminary act (art. xii.) they state that after the *Orinoco* had sounded one short blast, and had ported, the *Kaiser Wilhelm der Grosse* sounded one short blast, and the same allegation is repeated in paragraph 3 of the statement of claim, whereas it is now admitted that those in charge of the defendant vessel never blew one short blast, but twice sounded two short blasts, indicating that they intended to pass ahead of the *Orinoco*, a manœuvre which there was ample room to carry out if the *Orinoco* had not by hard-a-porting defeated their object.

Article 25 applies to a narrow channel, and not to a narrow place defined only by two points. In such a locality good seamanship suggests that the incoming vessel should wait until the outgoing vessel has passed clear, and therefore neither art. 25 nor the remarks in *The Knaresbro* (1) have any application.

the vessels were crossing, yet in the circumstances they were not vessels which would continue to cross; but, having regard to the dangers of navigation and of collision with each other, would naturally and necessarily act so as to pass port side to port side."

Counsel: *Aspinall, Q.C.*, and *D. Stephens; Laing, Q.C.*, and *Dawson Miller.* Solicitors: *Thomas Cooper & Co.; Botterell & Roche.* For a shorthand note of the judgment, see *Shipping Gazette*, November 10, 1900.—T. L. M.

(1) Supra, note (1), p. 38.

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Considering the size, length and speed of the *Kaiser Wilhelm der Grosse*, to pass port side to port side would have been impracticable, as it would have compelled her in a very short space of time and in very narrow waters to twice cross the bows of the *Orinoco*. From the closing in of the masthead lights of the *Orinoco*, observed by those in charge of the *Kaiser Wilhelm der Grosse*, it is evident that she must have starboarded at a time which was material to the present inquiry, that is, when much nearer in than the plaintiffs are willing to admit. This, but for the subsequent porting, would have brought the *Orinoco* under the stern of the *Kaiser Wilhelm der Grosse*, and so enabled that vessel to cross ahead and pass out in safety. The *Orinoco* should have obeyed art. 21 and kept her course and speed, for those in charge of the *Orinoco* saw the green light of the *Kaiser Wilhelm der Grosse*, and therefore knew that that vessel was crossing.

Aspinall, K.C., in reply. Seeing a green light does not immediately imply the crossing rule for the locality affects the question, and there must be time for those in charge, exercising ordinary care and skill, to appreciate the situation, and there must be opportunity for compliance: *The Theodore H. Rand.* (1) Whether this was a narrow channel or not, the observations of the Court in *The Knaresbro* (2) apply, for the adjacent water is included in the narrow passage just as r. 20 of the Tyne by-laws has been construed, for the purposes of navigation, to include some portion of the open water outside the pier heads.

SIR GORELL BARNES, PRESIDENT. The collision in this case took place on November 21 last—that is to say, only about three weeks ago—near the entrance to Cherbourg, between the steamship *Orinoco* and the steamship *Kaiser Wilhelm der Grosse*. The *Orinoco*, with her bowsprit, figurehead and stem, came in contact with the starboard bow of the *Kaiser Wilhelm der Grosse*, and considerable damage was done to both vessels. I think, though we have heard no evidence about it, that there was some loss of life.

The *Orinoco* is a screw steamer, of 4571 tons gross, belonging

(1) (1887) 12 App. Cas. 247. (2) *Supra*, note (1), p. 38.

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to the Royal Mail Steam Packet Company, and was bound from Southampton to the West Indies, via Cherbourg and Vigo, with passengers, general cargo, and a crew of 131 hands all told. She was approaching, in the course of that voyage, the entrance, called the west entrance, to the harbour at Cherbourg. The *Kaiser Wilhelm der Grosse* is a twin-screw steamship belonging to the port of Bremen, 649 feet long, and of 14,349 tons gross register. She was proceeding from Bremerhaven, via Southampton and Cherbourg, to New York, with passengers, mails, general cargo, and a crew of about 500 hands. She had put into Cherbourg and was proceeding out again. She had passed the *Orinoco* in the course of the afternoon as she went towards Cherbourg, and the *Orinoco* was coming into Cherbourg for the same sort of object, namely, to get passengers and go out again.

Now, the case presented on the part of the *Orinoco* is that she had been approaching the port originally at a speed of about twelve knots on a course of S. 9° W., that she had a French pilot on board, who had been taken on at Southampton to pilot her into Cherbourg; that at 7 o'clock, I think the time was, the course was altered to S. magnetic, that that course was kept until nearly the time when this collision took place; and that at 7.25 P.M. her engines were put to half-speed to reduce her way in going in between the two breakwaters. On her port hand as she went in would be the Fort de l'Ouest breakwater, and on her starboard hand the Fort Chavagnac breakwater. The case near the time of the collision is to this effect: that as the *Orinoco* was approaching the entrance the masthead lights of the *Kaiser Wilhelm der Grosse* were particularly noticed over the breakwater. That would be because the *Kaiser Wilhelm der Grosse* had been at anchor a little to the eastward of the western line of anchorage inside the harbour of Cherbourg, and the *Kaiser Wilhelm der Grosse* would have to come out, speaking generally, in a westerly and northerly direction to get to the entrance. At 7.25 P.M. the engines of the *Orinoco* were, as I have said, put at half-speed, a short blast was sounded on her whistle, and her helm was ported to keep well over on the starboard side of the passage. I understand, however, from the evidence, that

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at first she was heading so as to pass more or less towards the middle of the passage, and that was because the breakwater on the starboard hand has no light on it, and as she got near to it and could make out the end of the breakwater it would be possible to see where it was, and therefore she could, and did, keep a little more to the westward, so as to give an open passage, as far as possible, on the port hand. Then the case of the plaintiffs proceeds to aver that the *Kaiser Wilhelm der Grosse* sounded one short blast and the *Orinoco* sounded a second short blast; that at 7.28 P.M. the *Kaiser Wilhelm der Grosse*, whose green light came into view when she opened out the Fort de l'Ouest breakwater, instead of porting and keeping over to her starboard side of the passage, and passing the *Orinoco* port side to port side, sounded two short blasts on her whistle; that the engines of the *Orinoco* were thereupon put full speed astern, and three short blasts were sounded on the whistle, and the helm was ordered to be steadied, but the *Kaiser Wilhelm der Grosse* came on, attempting with her great speed to cross ahead of the *Orinoco*, and the collision happened.

The case on the other side is that the *Kaiser Wilhelm der Grosse*, which had left the anchorage to which I have referred, was steering for the western entrance, keeping the light of the Fort de l'Ouest on her starboard bow, and making about eight to ten knots through the water; that the two masthead lights of the *Orinoco* were seen about six points on the starboard bow over the breakwater about three miles away; that when the *Kaiser Wilhelm der Grosse* gathered way her engines were put to half-speed as she approached the entrance, and then, she having been up to that time on a W.N.W. course, her helm was ported to enable her to pass safely out of the entrance, and steadied on a course of N.W. $\frac{1}{2}$ N.; that directly afterwards her engines were set full speed ahead and her whistle sounded two short blasts, and, as no reply was received from the *Orinoco*, this signal was repeated; that immediately afterwards the masthead lights of the *Orinoco* were observed to be opening, indicating that she was porting, and at the same time her whistle was heard to be sounding a short blast; and that thereupon the engines of the *Kaiser Wilhelm der Grosse* were put full speed astern and her

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whistle was sounded three short blasts, but still the collision happened. That is an outline of the story told on the two sides. Broadly speaking, it comes to this: That the plaintiffs say that the defendant vessel ought to have ported or waited, and passed them port to port, either by slowing, if necessary, or porting enough to do so, and that she did not do so, but tried to cross ahead of the *Orinoco;* whereas the defendants' case is that they had the *Orinoco* broad on the starboard hand all the time, and that they were in a position to go right across her bows without any difficulty at all if she had not ported. That is the broad issue between the parties.

There is a small matter to dispose of first. There is no charge in the pleadings of the defendants that the lights of the plaintiffs' ship were in any way not in accordance with the regulations, but in the course of the evidence for the defendants it was suggested that there was some obstruction of the port light of the *Orinoco* which prevented its being properly seen by another vessel when nearly ahead, and that that may have accounted for the defendants' witnesses not noticing the light, as they say they did not, though the real reason they gave was that they were paying more attention to the masthead lights than to the side lights. The master of the *Orinoco*, however, said that there was no obstruction, and I do not see any reason, after hearing his evidence, for differing from him. I do not think there is anything in that point at all.

The next point I wish to refer to is that the place of the collision is agreed, and appears to have been at five cables, half a mile, W.N.W. of Fort de l'Ouest. Therefore a glance at the chart shews that it is well over to the west side of the entrance, somewhere about N.N.E. of the end of Fort Chavagnac, and very much nearer to it than to Fort de l'Ouest.

The first thing to consider in this case is what rule of navigation was to be observed by these two vessels going in and out of this place. The plaintiffs contend that the proper and seamanlike navigation of the locality is for each vessel to keep on her starboard hand and pass the other vessel port to port. Also, they contend that art. 25—the narrow-channel rule—applies. The evidence, so far as there is any evidence of practice in this

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matter, is given by the pilot of the *Orinoco*, a man named Alphonse Esnol, who is licensed for Cherbourg. He says the usual course in coming out of Cherbourg is to keep to the right —that there is no special rule, but vessels always keep to the right, and those which enter do the same thing, that is, keep to their right. There is no other evidence differing from that statement of practice, but it seems to me that I ought to consider this case, it may be, partly by the practice and partly also by the view which the Elder Brethren take of what would be good seamanship in such a case as this. Their view is most distinctly that the proper rule of seamanship to follow is in accordance with the rule or practice to which I have referred, entirely independently of whether art. 25 in strictness applies. So I do not know that it is necessary in this case to express a definite view about the application of art. 25, but I must say that my own inclination is to think, in accordance with what I said in *The Knaresbro* (1), that the rule ought to be taken as applicable to the passage between these two piers and so much of the water adjoining as was necessary for the negotiation of the channel at that spot. So it seems to me at the outset that the broad contention made by the plaintiffs is right, and that vessels ought to pass and expect to pass port to port.

Another rule which has been touched upon is the crossing rule (art. 19), but I think, having regard to the locality and the difficulties there are in applying that rule, the probability is that it is not applicable, and that the Court has to consider the case in the light of good seamanship, guided by the principle of art. 25, and possibly by the application of that article. The question, therefore, is whether there was in this case any difficulty in either vessel following this course, and the Court is of opinion that there was no difficulty whatever. Of course, if the *Kaiser Wilhelm der Grosse* were to come at seventeen or eighteen knots on a W.N.W. course up to the end of the breakwater, and then try to get round by porting, she would naturally find difficulty in following out that practice or rule, but there is no difficulty whatever, so long as you know there is a vessel entering the port, in either waiting a little while or else slowing down so as to be able

(1) Supra, note (1), p. 38.

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to come round under a port helm and thus comply with what I think ought to have been done.

These observations really dispose of the case, but there are one or two more matters which are to be noticed in regard to the evidence. I say the view that I have expressed, if right, disposes of the case, because on the outline of the two stories the *Kaiser Wilhelm der Grosse* did not follow that rule or that practice at all, and the other vessel did, subject to one or two minor points. There are, however, one or two other matters to which I think I ought to refer, and they are with regard to the position in which these two vessels were approaching each other. Now, the *Kaiser Wilhelm der Grosse's* witnesses really seek, it seems to me, to make out that from the first the *Orinoco* was in such a position as to have them nearly ahead of her. That is so from the statement that when the *Kaiser Wilhelm der Grosse* left her anchorage on a W.N.W. course she had the other vessel six points on her starboard bow; so also from the statement that when she got clear of the breakwater and was on a N.W. $\frac{1}{2}$ N. course, the *Orinoco* was about four points on her starboard bow. I think, however, when the chart is looked at, and the direction in which the vessels were going is considered, that cannot be correct, because the *Kaiser Wilhelm der Grosse* was steering from the anchorage within the western line of the anchorage, and the *Orinoco* was heading—and there is no reason why she should not be heading—for about the middle of the entrance between the piers. I therefore feel difficulty in seeing how it is then possible for the *Orinoco* to have had the *Kaiser Wilhelm der Grosse* ahead of her. Then, again, if the defendants' speed is taken as stated by their witnesses, and the speed of the plaintiffs' ship is taken, and the broad outline of their action together is taken, it is difficult to see how the contention of the defendants can be maintained. All this leads to the conclusion that the plaintiffs' ship did not, even on the defendants' own version of the facts, have the defendants' ship ahead of her, but that she really had the *Kaiser Wilhelm der Grosse* more or less on her port bow, as the master of the *Orinoco* says was the case. Then—and this is an important matter to notice—if the bearings and distances and speeds given by the defendants are treated as approximately

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correct, it seems to follow, from the fact that after allowing for the porting of two points by the *Kaiser Wilhelm der Grosse* the bearing of the other vessel did not, according to the defendants' evidence, change, that the vessels would meet at a certain point, and there would then be danger of collision from the very outset.

The result of these features of the case is that I accept the view of the position of the vessels presented by the master of the plaintiffs' ship. I think that the distances and bearings have been inaccurately estimated and considered by the defendants' witnesses, and that if there had been any substantial accuracy in what they say about the *Orinoco* having been in a position to have the *Kaiser Wilhelm de Grosse* nearly ahead of her, it would have been almost impossible for the collision to occur, because the defendants' vessel would then have been in a position to go right across and clear away from the *Orinoco*, and it would have been impossible for the *Orinoco* to catch her. The real truth of this collision is, in my opinion, that the *Kaiser Wilhelm der Grosse* was going out at a high speed, expecting, but erroneously expecting, to pass ahead of the *Orinoco*, and failed to do so. That she had considerable speed on at the time of the collision is, I think, perfectly clear from the damage done to her and the length which that damage extended on her bows, and also from the entry in the engineer's log. On this point, while referring to the damage, the view which I take, after consulting the Elder Brethren, is that the damage was done by a blow at an angle of about six points, and that, therefore, only involves an amount of porting on the part of the *Orinoco* of about two points, part of which may be accounted for by the reversed action of her engines.

The only matters left to consider are points made against the plaintiffs by counsel for the defendants. First of all, they charge the *Orinoco* with improperly porting her helm; and secondly, with not stopping and reversing her engines as soon as she ought to have done. With regard to the porting, there were certain comments made in connection with the whistles which these vessels exchanged. I think there is possibly some confusion about them, but one thing I am satisfied about, and that is that the whistling described in the evidence took place in a very short period of time, and the conclusion to which I have

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come on the facts is that probably the plaintiffs whistled first. At the same time I do not think it is established that the defendants ever gave a single short blast, such as is alleged in the plaintiffs' preliminary act and repeated in the statement of claim, as having been given by the *Kaiser Wilhelm der Grosse* between the two short single blast signals given by the *Orinoco*. The only other matter connected with this is that the pilot said he gave an order to port and the master said that knowing the vessel better he gave an order to hard-a-port, because he was not going very fast and thought it would be necessary to get the amount of porting required.

The result is that it seems to me, having regard to what I have already said about the practice and the rule of navigation, that it was in the circumstances quite justifiable for the plaintiffs' vessel to port her helm at that time; and the amount of alteration produced does not seem to me to have exceeded two points. I think, in the circumstances of the case, and the Elder Brethren agree with me, that the plaintiffs' vessel was justified in porting as she did in the reasonable and proper expectation that the *Kaiser Wilhelm der Grosse* would follow the practice and come out port side to port side.

That only leaves the question of the stopping and reversing. There again we have to deal with what those on the *Orinoco* would reasonably expect the other ship to do, and it is obvious they acted in accordance with their expectation by sounding a port helm signal. It was not, I think, until it was made reasonably clear to them that the *Kaiser Wilhelm der Grosse* was determined to cross the bows of the *Orinoco* that it was necessary for them to think that she would do otherwise than come out port to port; and as soon as they could reasonably be expected to realize it I think their engines were reversed and put full speed astern.

I think that disposes of the only two points made against the plaintiffs; but I wish to refer to two more matters. The defendants' master said that if he had ported he would have created greater difficulty, because he would have had to cross the track of the other vessel twice; that is to say, gone right away over to the starboard bow and then come back again. I am afraid that

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is not the view which the Court takes. That is only consistent with keeping up his speed. If he had come round slowly he would never have crossed the course of the plaintiff's vessel. The other point is this : I am not expressing an opinion whether the crossing rule does apply to this case at all, but if it were held to apply it would clearly make the defendants in the wrong. I am not, however, at all satisfied at present that, having regard to the locality and the practice of the port and art. 25, it would necessarily follow even then that the plaintiffs' vessel could be held to blame for porting and reducing her speed in the circumstances, or that had she not done so, a worse collision would not have taken place further aft on the defendants' vessel.

There is one other remark which the Elder Brethren wish me to make in this case, which is of some public interest. It is that this collision demonstrates, what strikes them very forcibly, the great advantage in what I believe are correctly termed schooner bows, because this steamer, the *Orinoco*, struck the *Kaiser Wilhelm der Grosse* first with her bowsprit, then with her figure-head, and then with the over-hang of the upper part of her stem, and yet the German vessel did not get a cut right down to the water's edge, which is what happens where vessels have straight stems. It is a matter which strikes the Elder Brethren, because but for the *Orinoco's* schooner bows this collision might possibly have been of a much more disastrous character. In my opinion the plaintiffs have not been shewn to have committed any error or fault in this case, and the defendants must be held alone to blame.

Solicitors for plaintiffs, the owners of the *Orinoco : Holman Birdwood & Co.*

Solicitors for defendants, the owners of the *Kaiser Wilhelm der Grosse : Clarkson, Greenwell & Co.*

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Restitution of Conjugal Rights—Wife's Petition—No Defence—Existence of Deed of Separation—Covenant not to sue for Restitution—Breaches by Respondent of Covenants in Deed—Investigation by the Court—Substantial Breaches—Decree.

If upon the hearing of a petition for restitution of conjugal rights it appears that there has been a deed of separation executed by the parties and containing a covenant not to sue for restitution, the fact of the existence of such a deed is not to be disregarded by the Court merely because the other party to the deed does not appear and set it up as a bar.

It is the province of the Court, in such a case, to inquire into the question of breaches (if any) of the covenants in the deed, and if, upon investigation, these appear substantial, the Court will not allow a deed which has become practically useless to the petitioner to tie the hands of the Court.

The proper time for the Court to consider the effect of such a deed is on the hearing of the suit for restitution of conjugal rights, and not on the hearing of any subsequent suit by the same petitioner grounded in part on statutory desertion arising out of the respondent's disobedience to the decree for restitution.

Tress v. *Tress*, (1887) 12 P. D. 128, commented on.

This was an undefended suit by the wife for restitution of conjugal rights.

Subsequently to the marriage differences between the parties arose. The wife's account was that her husband left her in 1905; that she went in search of him; that, although he knew she was coming, he made no preparation for her reception, and that he was in fact found by her to be living in adultery with another woman. On January 8, 1906, a deed of separation was executed. This deed contained covenants by the husband to pay his wife a third of his professional earnings and that she should live separately from him. There were the usual covenants as to the devolution of her property, whilst on her part there was (inter alia) a covenant not to sue for restitution of conjugal rights and not to molest him. The deed was acted upon for a time, but after May, 1906, the husband did not keep up his payments, and in August he sailed for America, after announcing his intention to make no further payments and expressing a desire that his wife should get a divorce as speedily as possible.

In the requisite preliminary letter before instituting proceedings

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the petitioner wrote to the respondent as follows: "The present condition of things is insupportable, especially as you are living apart from me of your own set desire for reasons which I resent but cannot control, and which I have offered to end. I am living on the charity of my mother owing to your neglect to provide me with any income, and, as you must know, this is degrading to me and cannot continue for ever. I am anxious to do what I can to end a very unpleasant state of affairs, and I now call upon you to take me to you as your wife, to provide a home for me, and to treat me as a wife should be treated. I cannot go on living like this, without a home, without income, and without you."

The respondent replied: "I have received your letter, but cannot agree to any of your requests."

The petition was then presented.

R. H. Pritchard, for the petitioner. The respondent has not set up the deed, and the Court need not notice it: *Tress* v. *Tress*. (1) Possibly, as in that case, the respondent has not set up the deed because he knows that he has broken the covenant to pay the allowance. In *Hardie* v. *Hardie* (2), *Tress* v. *Tress* (1) was followed, subject to reservation of the Court's power to look into the whole matter in any suit (for divorce) in the event of such a suit being based upon non-compliance with the decree for restitution. In *Kunski* v. *Kunski* (3) the late President (Sir F. H. Jeune) pointed out that default in payment went to the root of the matter, and that, in the event of substantial refusal to pay, the respondent to a restitution suit would not be entitled to set up the deed. *Clark* v. *Clark* (4) is distinguishable. In that case the husband did set up the deed, and no question of breaches arose. Quite apart, however, from the deed, suits for restitution of conjugal rights are, by s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), to be dealt with on the same principles which guided the Ecclesiastical Courts; and there is abundant authority for the proposition that the Ecclesiastical Courts would have disregarded the deed.

(1) 12 P. D. 128.
(2) (1901) 70 L. J. (P. & M.) 29.
(3) (1898) 68 L. J. (P. & M.) 18.
(4) (1885) 10 P. D. 188.

[SIR GORELL BARNES, PRESIDENT. You need not labour that.]

In *Besant* v. *Wood* (1) Sir G. Jessel M.R., whilst holding that the deed was in that case a bar, evidently from his examination of the alleged breaches of covenants and their extent, was of opinion that, had they been substantial, they would have had the effect of rendering the deed nugatory.

SIR GORELL BARNES, PRESIDENT (after stating the facts of the case), proceeded as follows:—Now it comes to this, that the respondent has repudiated the deed; and that gives rise to the position investigated by counsel in his argument before me, which I think results as follows:—

In the Ecclesiastical Courts a deed of separation would not have amounted to any interference with the petitioner's right to sue for restitution of conjugal rights. At a later date several decisions in the Courts—*Wilson* v. *Wilson* (2), for instance—laid it down that, though a petition might accordingly be filed notwithstanding a deed, there was nothing inconsistent with that in taking steps to restrain, by injunction, proceedings for restitution of conjugal rights where the deed contained a covenant not to sue for restitution. This was a roundabout proceeding; and, since the Judicature Act, it is not now necessary to restrain the suit for restitution by granting an injunction, because the deed can be raised as a defence in the restitution suit itself, instead of merely treating the deed as a ground for restraining that suit: *Marshall* v. *Marshall.* (3) If it be not so raised, then it is argued on behalf of the petitioner, according to what is supposed to be the effect of *Tress* v. *Tress* (4), that the Court may disregard the deed.

Now that is a view I do not agree with. It must be remembered that the avowed object at the present time in the vast majority of cases of suits for restitution of conjugal rights by wives is not restitution at all, nor even an allowance, but, in the event of non-compliance with the decree on the part of the respondent (husband) and with the further offence on his part of adultery, to obtain a divorce.

(1) (1879) 12 Ch. D. 605.
(2) (1848) 1 H. L. Cas. 538.
(3) (1879) 5 P. D. 19.
(4) 12 P. D. 128.

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It is not too much to say that the restitution portion of these proceedings is a farce, because their true object is not the object which appears on the face of them. The true object, as in *Tress* v. *Tress* (1), is not to get an allowance, but to obtain a divorce. But, though this may be the necessary consequence of the existing state of the law, in my opinion the Court must be at liberty to consider the position of the petitioner who is living apart from her husband under a deed of separation. Her claim to restitution rests on the separation of the parties being without good cause; and such a claim cannot properly be maintained where there is a deed with such a covenant as this, which is itself, prima facie, good cause for the separation.

It is equally clear that the Court is entitled to consider the effect of the deed, even if the husband does not appear and set it up.

Possibly this may be done in the second suit, i.e., in that for divorce, where that form of proceeding follows; and that view I was inclined to take in *Hardie* v. *Hardie*. (2) There are, however, obvious inconveniences attending that course; for instance, the second suit might be heard by a different judge, who would know nothing about the first case, and all that would be done before him would be to put in the decree for restitution and prove that it had been duly served, and, the time limited in the decree having expired, that it had not been complied with.

In *Tress* v. *Tress* (1) I think it is obvious that Sir James Hannen was influenced by the fact that there had been breaches of the covenant to pay the allowance. But I have always felt that the whole matter must be dealt with on some satisfactory principle; and I so pointed out in the subsequent case of *Hardie* v. *Hardie* (2), where I said that I should there act upon the view Sir James Hannen had expressed, but that the matter might be generally dealt with when the divorce suit was brought forward.

On further reflection I have come to the conclusion that the question should be dealt with in the first—that is, in the restitution—suit, and that this will be the proper course to observe in the conduct of future cases. But this is not all that there is to be said about this matter, because, looking back at the history

(1) 12 P. D. 128. (2) 70 L. J. (P. & M.) 29.

of the whole subject, in my opinion it remains for the Court to consider whether in the circumstances it should hold the deed to be a bar. In *Besant* v. *Wood* (1) Jessel M.R. certainly held the deed binding; but then it appears, from the report of that case, that on examining the alleged breaches of the covenants in the deed he found them to be of no substantiality. The breaches may, however, be very substantial indeed where, as in this case, the payments have in fact not been made and the deed has been absolutely repudiated with reference to future payments.

Covenants on the one part not to sue for restitution, and on the other part to pay, may be independent, as was pointed out in *Fearon* v. *Lord Aylesford* (2), in this sense, that some may be enforced whilst the others were not complied with. In the present case the agreement on the one part not to sue is, as I expect it is in most cases, in consideration of the agreement on the other part to pay; and I think the Court should not allow its hands to be tied by the covenant not to sue in a case such as the present, where the obligation to pay has been repudiated.

Although, the case being undefended, I have not been assisted by an adverse argument, my present opinion is that the deed in such circumstances is useless to the petitioner, and that it is not right that the Court should act upon it in this suit by refusing the relief asked. I therefore pronounce a decree of restitution of conjugal rights, with costs against the respondent.

Solicitors: *Pritchard, Englefield & Co., for Sampson & Price, Manchester.*

(1) 12 Ch. D. 605. (2) (1884) 14 Q. B. D. 792.

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Dec. 5, 6.

SIMPSON *v.* FOXON.

Probate—Several testamentary Documents—Words of Revocation—"Last and only Will"—Intention gathered from the Documents themselves—All the Documents admitted to Probate.

A testator in 1898 executed a will disposing of all his property and appointing his daughter executrix.

In 1903 he duly executed a document on a printed form, commencing "This is the last and only will of me," whereby he bequeathed the proceeds of an insurance policy and appointed an executor.

In 1905 he duly executed a further document, described as "a codicil to the last will," whereby he made certain bequests and appointed other executors:—

Held, that the words "last and only" in the intermediate document did not preclude the admission to probate of all three documents.

PROBATE SUIT.

The plaintiffs Herbert Simpson and William Biggs, as the executors appointed under a codicil dated April 11, 1905, of John Foxon, who died on June 25, 1905, claimed probate of that document, together with two wills of the said deceased dated respectively March 15, 1898, and September 11, 1903.

The defendants Charlotte March Foxon, the widow, and Annie Foxon, the daughter of the deceased, admitted the valid execution of all three documents, but the substance of their case was "that the will dated the 15th day of March, 1898, was revoked by the will dated the 11th day of September, 1903, as confirmed by the codicil dated the 11th day of April, 1905," and they counter-claimed that the Court should pronounce in favour of "the last and only will" of the deceased dated September 11, 1903, together with the codicil thereto dated April 11, 1905, the effect of which would be that the widow and daughter would benefit from the undisposed of residue of the deceased's estate.

The testator, John Foxon, late of Friar Lane, in the borough of Leicester, accountant, made a will dated March 15, 1898, whereof he appointed his daughter Annie Foxon sole executrix and trustee, and devised and bequeathed to her all his real and

personal property upon trust for sale and conversion and to pay debts and funeral and testamentary expenses, and to invest the residue and to stand possessed of the moneys and investments upon trust to pay the income arising from the same—as to one-third to the testator's daughter, one-third to his son (who predeceased him), and one-third to his sister, with certain contingent remainders over. This will was drawn by a solicitor, who, with his clerk, attested the testator's signature. On April 11, 1905, the testator, through another solicitor, executed a codicil, which was described as "a codicil to the last will."

By this codicil the testator revoked all previous appointments of executors and trustees, and, after appointing Herbert Simpson and William Biggs to be joint executors and trustees "of my will" and giving a legacy to William and Harriett Biggs jointly and another legacy to his daughter Annie Foxon and empowering Mr. Simpson to charge for all work which he might do in connection with the testator's estate and the proof "of my will," including work which an executor and trustee might do personally, the document was attested "as and for a codicil to his last will."

Between the dates of those two documents the testator, who had insured his life for a small sum, executed a printed form which he obtained from the insurance company and which appeared after his death in the terms following :—

"This is the last and only will and testament of me, John Foxon, of 47, Friar Lane, Leicester. . . . . I give and bequeath to Harriett Biggs of 47, Friar Lane, Leicester, the policy of assurance of my life No. 8478864 in the sum of 4*l.* 13*s.* issued by the British Workmen's and General Assurance Company and that she shall be at liberty to receive the amount due to me at my death under such policy of assurance and that receipt shall be a sufficient discharge for the same. And I appoint William Biggs executor of this my will. In witness whereof I have hereunto set my hand this 11th day of September, 1903.

"(Signature of testator) John Foxon.

"Signed and declared by the said testator as and for his last will and testament in the presence of us present at the same time

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who in h presence at h request and in the presence of each other have hereunto subscribed our names as witnesses.

"(Signature of witness) Harry Gillespie.

"Address—41, Friar Lane.

"(Signature of witness) William Weston.

"Address—Bakehall Street Place."

Formal proof was given as to the first two documents; and Mr. Herbert Simpson, solicitor, who was called to prove the codicil, stated that the testator, who was very secretive about his affairs, told him, at the time when he gave instructions for the codicil, that he had made "a will," but never mentioned two wills. Mr. Simpson further stated that subsequently, and down to shortly before the death, the testator repeatedly told him that he wanted to make a fresh will.

Bayford, for the plaintiffs, stated the facts and asked for probate of all three documents, intimating at the same time that if the Court took the view put forward by the defendants the plaintiffs would be quite content with the decision of the Court.

Durley Grazebrook, for the defendants. There is no plea of want of knowledge and approval. The words "last will" might perhaps be considered as a misdescription in some cases, and there are decisions to that effect. The word "last" imports the existence, at some time, of more than one will, but the word "only" excludes the idea of any other will. No reported case has been found where the words before the Court were "the last and only will." The testator must be bound by what he put his hand to. [He referred to *Collins* v. *Elstone* (1) and *In the Goods of Baxter*. (2)]

SIR GORELL BARNES, PRESIDENT (after stating the facts). There is no doubt to my mind that, as a matter of fact, the deceased cannot really have intended the policy form of will to have been a revocation of his general dispositions and to have left himself intestate as to the greater part of his property. I do not suppose that anyone, having these facts before him, could come to the conclusion that the deceased did so intend.

(1) [1893] P. 1. (2) [1903] P. 12.

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But what a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail. The principle has been very fully considered in a number of authorities. I think there is a good deal more authority than was stated to me in the arguments. The numerous authorities reported, such, for instance, as *Plenty* v. *West* (1), where the words in question were "this is the *last* will," arose out of some difference of opinion which existed in former days as to the effect to be given to those words, but which may safely be considered as set at rest by the later decisions. The words "the last will" would not revoke a former will, if not inconsistent with it; the last will might even tend to confirm what had gone before. And so it is necessary to see what are the provisions in the last will, and if these provisions are inconsistent with those in the earlier document it may be that the later revokes the earlier one. But it does not necessarily follow that it always will do so if the two documents can stand properly together.

The principle to be generally applied in considering matters of this kind is very well stated in *Lemage* v. *Goodban* (2), where Lord Penzance, quoting from Williams on Executors (3), says: "The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that as no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be *partly* inconsistent with one of an earlier date, then such latter instrument will revoke the

(1) (1845) 4 Notes of Cases, 103; 1 Rob. 264.

(2) (1865) L. R. 1 P. & M. 57, at p. 62.

(3) 6th ed. p. 156 (in 10th ed. pp. 119, 120).

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former, *as to those parts only*, where they are inconsistent." The learned judge added: "This passage truly represents the result of the authorities"; and he continued as follows: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the Court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate,—is the true question. And so this Court has been in the habit of admitting to probate such, and as many papers (all properly executed), as are necessary to effect the testator's full wishes, and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

That being the principle which seems to me applicable to the present case, I do not feel any difficulty in arriving at a decision upon it. In my opinion all three documents should be admitted to probate. I do not think, having regard to the circumstances which these testamentary papers disclose, that the words "last and only" can be taken as revoking what had been done by the previous will.

The document which contains the words in question is a printed form, evidently drawn up for the purpose of disposing of a policy of assurance only and appointing an executor to deal

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with that matter only. It is very unfortunate that it should have been drawn in this way, but it is, notwithstanding the words "and only," not intended to be a complete disposition of the testator's property.

If the other view were adopted it would lead to this, that apart from the insurance money, the whole of this man's property would remain undealt with, except as to what is disposed of by the codicil, although the testator cannot possibly have had any idea that he had not disposed or was not disposing of all that he could have dealt with.

The words "last and only" cannot be treated as an express revocation; and, applying the principles I have already referred to, the dispositions of this man's property seem to me to shew that the document in question was not intended by him to be, and it is not, upon its face, a controlling and revoking disposition. In other words, neither by express intention nor by disposition of property can you gather that the words "and only" are to be treated as a revocation of the earlier will.

I grant probate of all three documents. The costs must, of course, come out of the estate.

Solicitors for plaintiffs: *Henry Clarkson & Sons, for Henry Simpson, Leicester.*

Solicitors for defendants: *Rodgers & Gilbert.*

H. D. G

1906

THE ST. AUBIN.

Aug. 9, 10.

Admiralty—Collision—Barge swinging across Fairway unattended and without Light—Preliminary Article, Thames By-laws, 1898.

The defendants' steamship coming down the river Thames at night struck and sank the plaintiffs' laden dumb-barge, which was swinging to the ebb tide athwart the fairway unattended, and held only by her head-fast to another barge which was lying alongside a steamship moored at Greenwich tier :—

Held by Bargrave Deane J., that the plaintiffs, the owners of the barge, were alone to blame, for they ought to have had a man in charge ready at the turn of the tide to shew a light to approaching vessels, the absence of any warning signal being, in the circumstances, a breach of the preliminary article to the Thames By-laws, 1898, by which nothing in those by-laws "shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals or to keep a proper look-out, or of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

Action of Damage by Collision.

The plaintiffs were the owners of the dumb-barge *Grace*, and of her cargo.

The defendants were the owners of the screw steamship *St. Aubin.*

The case is reported on the question of the duty incumbent on the owner of a barge, swinging to the tide in the Thames at night, to have a man on board ready to shew a light in order to attract the attention of approaching vessels.

The facts, the arguments of counsel, and the material portions of the Thames By-laws are all fully set out in the judgment.

Laing, K.C., and *A. E. Nelson*, for the plaintiffs, the owners of the *Grace* and of her cargo.

Aspinall, K.C., and *Adair Roche*, for the defendants, the owners of the *St. Aubin.*

Bargrave Deane J. This is an action brought by the owners of the dumb-barge *Grace* and her cargo for damage occasioned by

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a collision with the *St. Aubin*. The *St. Aubin* is a steamer of 1181 tons gross register, and she left London on a voyage to South Shields, in water ballast, in the early morning of January 30. The collision happened off what is called the Greenwich tier, and the result was that the barge was cut halfway through and sunk. That shews that the steamer must have had some way on her, but in the case of damage done to a barge I am not so sure that it proves very high speed. The allegation is that the cause of the collision was bad look-out on the *St. Aubin*, and that she was improperly navigated too near to the Greenwich tier.

The facts are these. The *Grace* went down the river to a steamship called the *Victorious*, which was lying at Greenwich tier, and at the material time exhibiting the two regulation riding lights in her port rigging. Alongside the steamer was a barge called the *Joe*, and the *Grace* was made fast by her headrope to the side of the *Joe*, keeping her stern loose. When the ebb tide began to make, somewhere about half-past five, the lighterman in charge of the *Grace* was not on board—he was on the *Victorious*—and the barge, as the tide turned, began to swing with her stern out towards mid-channel, and would eventually, no doubt, have swung round alongside the *Joe*, with her head to the stern of the *Joe*, that is to say, heading up river. It was while she was athwart the stream, at right angles to the *Joe*, that she was struck by the *St. Aubin*. She was a barge laden with a cargo of 120 tons of pitch, and, according to the evidence of the man in charge of her, she had a freeboard of some 15 inches. The night is said to have been dark but clear, and, as far as I can estimate as a fact, I think she was altogether away from the side of the *Victorious* between 80 and 90 feet—perhaps a little more, 90 to 100 feet, taking the extreme end of her.

The story of the *St. Aubin* is that she was coming down river at full speed, and at some little distance up river from where the *Victorious* lay she eased her engines, and then stopped them, owing to a report from the mate, on the look-out forward, of a red light on the starboard bow. That turned out to be a barge coming out of Deptford Creek and crossing the bows of the

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St. Aubin. She was followed by another sailing barge, also coming out of Deptford Creek. There has been some contradiction in the case as to whether that second barge was carrying lights or not, but I need not discuss that question, because the master said that the second barge did not affect his navigation. Undoubtedly the fact of these two barges crossing the bows of the *St. Aubin* with their sails up and the wind W.S.W. would be a matter which might interfere with the look-out on the *St. Aubin* seeing this barge, lying low in the water and athwart the river. The *St. Aubin* ported a little, steadied, and then starboarded to get back on to her course, which she said was to the southward of mid-channel, and almost immediately she found this barge under her bows. That position of things raises two questions. First, was there a proper look-out kept on the *St. Aubin?* It is impossible for me to say that the look-out on the *St. Aubin* was defective because those in charge did not see this barge sooner than they did. It was a dark night, the barge was only 15 inches out of the water, and was lying right athwart, and there was absolutely nothing to attract attention. On the other hand, it is said that there ought to have been a light on the barge. I will deal with the regulations presently, but it seems to me that there being no light certainly was a matter which interfered with the look-out on the *St. Aubin* seeing the barge. As to the speed of the *St. Aubin*, I am not prepared to say—and the Elder Brethren so advise me—that the *St. Aubin* was going, in the circumstances, at the time of the collision or immediately before the collision, at an improper speed. The damage done to the barge might have been occasioned by the *St. Aubin*, going at about two knots at the time of the collision, which is what the master put the speed at.

A more serious question in this case really is, What was the cause of this collision? Was it inevitable? In other words, is there nothing which could have been done which might have prevented it? The regulations have been much discussed by counsel on both sides, and I agree that it is very difficult under the Thames Rules to see where you are to find a regulation which in fact deals with this case. First of all counsel for the defendants

say that rule 30 applies, for by the interpretation clause the word "vessel" includes a "lighter" and the word "lighter" includes a dumb-barge, and, therefore, she was "a vessel under 150 feet in length." Then rule 30 says: "With the exceptions hereinafter named, a vessel under 150 feet in length, when at anchor or moored, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light (hereinafter called the riding light) in a lantern so constructed as to shew a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile." I am unable to bring myself to say that this case is within that rule, for, after hearing all the evidence about custom and practice, I cannot say that this was a vessel under 150 feet at anchor or moored, and, therefore, ought to have carried a white light, when in that position alongside the *Joe*. The accident, however, did not happen when she was in that position. The accident happened when she was absolutely unattended and was projecting out athwart the stream from the *Joe*, to an extent, as I have said, of 90 to 100 feet. Then there are the exceptions mentioned in article 30. The exceptions clearly do not apply. She was not a masted vessel lying inside in a tier under exception (*a*); she was not a lighter lying at the usual barge moorings under (*b*); and she was not a lighter moored permanently head and stern in the river under (*c*). Can it then be said, as counsel for the plaintiffs seem to infer, that there is absolutely no provision for dealing with such a case as this, either in the Thames Rules or in the general Sea Rules? There is a preliminary article to rules 28 to 35 of the Thames By-laws headed "lights and signals," and a material portion of that article runs thus: "Nothing in the following by-laws shall exonerate any vessel, or the owner master or crew thereof, from the consequences of any neglect to carry lights or signals, or to keep a proper look-out, or of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." That is, I think, nearly identical with article 29 of the Sea Rules: "Nothing in these rules shall exonerate any ship, or the owner master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to

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keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Now, is it reasonable that a barge, at night, on a dark night, attached only by her headfast to the side of a barge alongside a ship, should be left absolutely unattended at the turn of the tide, so that she should be allowed to swing out as this barge was allowed to swing out—to swing out without anybody on board her to give notice, and, still more, without anybody on board to shew a light or to take any precaution which, in the wording of the rule, "may be required by the ordinary practice of seamen or by the special circumstances of the case"? In my opinion the special circumstances of the case—of every case of this description, when on a dark night a low-lying barge is allowed to swing out right in the path of vessels going up and down—require that somebody should be on board, so as to shew a light. We know that by article 31 barges must have a light handy when they are under way: "Every person in charge of a lighter, when under way and not in tow, shall, between sunset and sunrise, when below London Bridge, have a white light always ready, and exhibit the same on the approach of another vessel." It is true that article does not apply to this particular case, but it does shew that it is necessary that there should be precautions at hand on board a lighter, in order to avoid any difficulty which may arise. In my opinion, and I am glad to say that I am supported by the Elder Brethren in this matter, there ought on this barge to have been a person—the man in charge of it; but he says he was not on his barge, and that he was on board the *Victorious* when his barge swung. He ought to have been on the barge and ought to have had a light ready to be shewn, and ought to have shewn it, to an approaching steamer. I know the question is somewhat of a novel character, and if I am wrong the Court of Appeal can put me right, but I think this preliminary paragraph covers the case, and I have no hesitation in saying that in this particular case there was what I consider to be negligence under that paragraph in not having a man on board the barge, with a light, prepared to be shewn to the *St. Aubin* as she came up.

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The result is that I think the only blame for this collision rests with the *Grace*.

Solicitors for plaintiffs, the owners of the *Grace*: *J. A. & H. E. Farnfield*.

Solicitors for defendants, the owners of the *St. Aubin*: *Thomas Cooper & Co.*

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May 17, 18, 21, 22; *July* 2; *Aug.* 7; *Nov.* 27; *Dec.* 1, 12.

Admiralty—Damage—Practice—Costs as between Solicitor and Client—Action against Tyne Improvement Commission—Judgment for Defendants—Statutory Power—Mode of Exercise—Deviation—Act done in "intended" Execution of Public Duty—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*b*).

In an action by the owners of a steamship against the Tyne Improvement Commission for the amount of the damage occasioned to the vessel by a fire which originated on one of the defendants' coal staiths, judgment was given in favour of the defendants on the ground that they, as owners of the staith, had not been guilty of negligence. The defendants thereupon claimed, under sub-s. (*b*) of s. 1 of the Public Authorities Protection Act, 1893, to recover from the unsuccessful plaintiffs their costs as between solicitor and client:—

Held by Sir Gorell Barnes, President, that the defendants were a public authority, and as such entitled to have their costs so taxed, for in the erection and working of the staith they must be taken to have acted in "intended" execution of a public duty within the meaning of the Act, although the staith, and the line of railway connected with it, might not have been constructed in strict conformity with their statutory powers, the question of deviation from deposited plans being for the parties affected thereby, such as the neighbouring owners, and not for the plaintiffs.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Johannesburg*.

The defendants were the Tyne Improvement Commission.

The case is reported on the question whether the defendants were persons acting in pursuance or execution of any statutory or public duty or authority, and therefore entitled to avail

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themselves of the provisions as to costs of the Public Authorities Protection Act, 1893. (1)

On June 2, 1905, the plaintiffs, as owners of the *Johannesburg*, issued a writ against the Tyne Improvement Commission for damage sustained by their steamship, and by their statement of claim alleged that the defendants were the owners of a loading staith known as No. 5 on the river Tyne, which they held out to be a fit and proper place for bunkering, and invited steamships to bunker thereat for reward; that on March 3, 1905, the *Johannesburg* was, at the invitation of the defendants, and on payment of dues to the defendants, being loaded with bunker coal at the staith, and the defendants, by so inviting her to load and by holding out the staith as a proper loading place, and by receiving and taking payment for the use of the same, impliedly warranted that the staith was a fit and proper place for the steamship to load at, and that they had taken all reasonable care to render the staith a fit and proper place for that purpose, and they impliedly undertook that all reasonable care should be taken that the steamship was not damaged while so loading; that a fire broke out on the staith, whereby the steamship was seriously damaged; that at the time of the outbreak of the fire a heavy loading spout, the property of the defendants, was projecting over the steamship, and the defendants' servants wrongfully and negligently failed to raise the same and thereby prevented the steamship being quickly removed from the staith, and in consequence thereof the steamship suffered more damage from the fire, and from the fall of the spout. The plaintiffs then alleged that the staith was not (as the defendants well knew or ought to have known) a fit and proper place for the steamship to load at, and the defendants did not take

(1) 56 & 57 Vict. c. 61, s. 1: "Where after the commencement of this Act any action . . . . is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect:

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

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proper care to render and maintain the same safe; that the staith was constructed of a highly inflammable material, namely, creosoted timber, and was lighted by electric light, which rendered the structure highly dangerous unless the greatest care was taken in the construction, maintaining, and looking after the electric installation; that the installation was not in fact properly constructed, maintained, $\frac{\text{and}}{\text{or}}$ looked after, and in fact caused the fire which broke out on the staith; that the defendants improperly and negligently used the installation when it was in a defective state and by not having it closely watched and constantly inspected, and by not having a proper self-recording apparatus connected therewith, negligently failed to discover the defects therein, and that by reason of the negligence of the defendants in allowing the defects to arise, and in negligently failing to discover the same, and in using the same when in a defective state, the fire took place whereby the plaintiffs' steamship was damaged. The plaintiffs further alleged that the electric installation was destroyed by the fire, and they set out particulars of the defects therein, and finally alleged that the defendants negligently and improperly failed to provide any or sufficient and proper fire extinguishing apparatus on the staith, and by reason thereof the fire spread to the steamship.

By their defence the defendants denied that there was any warranty or undertaking as alleged, and they denied that they were guilty of any negligence or of any breach of warranty. They further denied that the fire arose through any fault or neglect on the part of their servants, and they alleged that so far as they were concerned it was an accident. They also alleged that the loading spout was, shortly after the outbreak of the fire, raised clear of the *Johannesburg*, and that there was ample time for the plaintiffs' servants to have shifted the vessel away; that the staith was a fit and proper place at which to load the *Johannesburg*, and that all reasonable steps were taken to keep it in a good and safe condition; that the staith was built of the ordinary and usual materials, which were not highly inflammable; that the electric light installation was properly designed, constructed, maintained, and looked after, and was in all reasonable respects thoroughly efficient, fit, and proper for

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the purpose for which it was used and required; that the fire was not in fact caused by the electric light installation. They further alleged that though the fire extinguishing apparatus, kept for the protection of their works, was not and could not reasonably be at the staith at the time the fire broke out, the absence of the same had no effect and did not cause the fire to spread to the *Johannesburg*. In the alternative the defendants alleged that the plaintiffs could, by the exercise of ordinary skill and care, have avoided the consequences of the fire, and were guilty of contributory negligence. By their particulars the defendants alleged that the fire arose through a burning brake block falling from a waggon on to the six-foot way a little over one hundred yards from the river end of the staith, and, by amendment allowed at the trial, they alleged that there was no negligence to be attributed to the defendants in respect of the brake.

The hearing commenced on May 17, was continued on the 18th, and, on the 21st Sir Gorell Barnes, President, intimated that he did not think the electric installation had anything to do with the fire. Thereupon the plaintiffs applied for and obtained leave to amend by alleging, alternatively, that the fire was caused by the negligence of the defendants in allowing a burning brake block to fall upon inflammable material, and not having any fire extinguishing appliances ready.

On May 22 the President delivered judgment in favour of the defendants, holding, on the merits, that the plaintiffs had failed to establish any default entailing legal liability on the defendants. Thereupon the defendants, on the ground that they were a public authority, applied under sub-s. (*b*) of s. 1 of the Public Authorities Protection Act, 1893, for their costs against the unsuccessful plaintiffs "to be taxed as between solicitor and client."

July 2; Aug. 7; Nov. 27; Dec. 1. *Pickford, K.C., Laing, K.C.*, and *The O'Conor Don*, for the plaintiffs, the owners of the *Johannesburg*.

J. A. Hamilton, K.C., and *D. Stephens* (*Rufus Isaacs, K.C.*, with them), for the defendants, the Tyne Improvement Commission.

The arguments of counsel fully appear from the judgment, and all the material sections of the statutes referred to are there set out. In addition to the cases mentioned in the judgment the following were cited:—By the plaintiffs, on the question of unauthorized deviation: *Doe d. Payne* v. *Bristol and Exeter Ry. Co.* (1); *Doe d. Armitstead* v. *North Staffordshire Ry. Co.* (2); *Dowling* v. *Pontypool, Caerleon and Newport Ry. Co.* (3); *Crawford* v. *Chester and Holyhead Ry. Co.* (4) By the defendants, on the question of their being a public authority: *Jeremiah Ambler & Sons, Ld.* v. *Bradford Corporation* (5); *Fielden* v. *Morley Corporation* (6); *Lyles* v. *Southend-on-Sea Corporation* (7); and that they acted in intended execution of their powers: *Selmes* v. *Judge.* (8)

Dec. 12. SIR GORELL BARNES, PRESIDENT. This is an action by the owners of the steamship *Johannesburg* against the Tyne Improvement Commission, which was heard before me in the month of May last, when I decided it altogether in favour of the defendants, and thereupon an application was made on the part of the defendants under the Public Authorities Protection Act, 1893, s. 1, sub-s. (*b*), to be allowed solicitor and client costs on the ground that the action had been one against the defendants for an "act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority."

The arguments of counsel were first directed to the main question whether the defendants were a public authority within the meaning of the Act, which is headed: "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." This main point was very fully argued, and a number of cases were cited on both sides, and at the close of the arguments the plaintiffs required the defendants to prove that the staiths and railway adjoining in connection with the general

(1) (1840) 6 M. & W. 320.
(2) (1851) 16 Q. B. 526.
(3) (1874) L. R. 18 Eq. 714.
(4) (1847) 11 Jur. 917.
(5) [1902] 2 Ch. 585.
(6) [1899] 1 Ch. 1; [1900] A. C. 133.
(7) [1905] 2 K. B. 1.
(8) (1871) L. R. 6 Q. B. 724.

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railway system were erected under their Act, and for that purpose the case stood over for a short time. Then evidence was given on that point, and the engineer to the Tyne Commissioners was called and gave evidence about it.

To render what I have to say about this case intelligible, it is necessary to refer to the plan which shews what was originally contemplated as being the works to be executed by the Tyne Commissioners and what the works actually executed were. In the plan which was put before me the staiths as constructed are coloured red, and the No. 5 staith is the most easterly. The staiths and railway shewn on the deposited parliamentary plans in 1866 are coloured green, and they shew how it was originally intended that these staiths should be erected. Then the plan also shews a boundary line between land which was required by an Act of 1867, to which I must refer, and certain lands required under an Act of 1872, and the division is shewn by a dotted black line edged with brown, which is to the westward of the place where No. 5 staith is in fact erected, but to the eastward of where the most easterly green drawing of a staith is shewn. The limits of deviation on the deposited parliamentary plan of 1866 are shewn on this plan also, and those limits of deviation extend a very long way back to the eastward and westward of all the works which have been considered in this case, and there is no doubt that the staith is a long way within the limits of deviation shewn on the plan. The Albert Edward Dock is to the eastward of the position of the staiths, and the greater part of this is inside the limits of deviation, but there is a small bit of it to the eastward apparently, though I do not think it has been considered in this matter at all. The limits of deviation on the plans deposited in 1871 are also shewn, and those extend still further to the eastward than the limits of deviation on the plans of 1866, and appear to include the whole of the Albert Edward Dock and to include the staith in question in this case. The plan also shews the quay which was to be constructed, and which was constructed along the face of the river, and that is marked in brown. The western end is to the westward of this No. 5 staith and the eastern end of it is to the eastward of No. 5 staith. It runs a considerable distance along the river, and, as I understand, it is shewn

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in the plan as proposed and the deposited plan of 1871 as constructed, and the staiths in question and the railway, which is also in question, ran to the edge of or partly over this quay. That sufficiently explains the locality. The engineer of the commissioners seemed to consider that this staith was erected under the statute of 1867, to which I have to refer. It has in fact been argued that if it was not constructed under that Act it may be treated as constructed under the Act of 1872. The No. 5 staith, I understand, was, in fact, constructed in the year 1903—that is to say, about a year before the accident took place. On the evidence which was given by this witness, the junior counsel for the plaintiffs, who was then, I think, alone in Court, made a certain point as to the way in which the structure had been carried out. The railway—by which the staith is erected, and I suppose, therefore, the staith itself, which is a continuation on which the railway goes—is seven feet higher than on the plans deposited, and about 200 yards to the eastward of the place on the plan on which the railway and staith were shewn originally in 1866, and the railway is longer than as shewn on that plan. The point was therefore taken that in these two particulars the defendants had not acted within the authority conferred on them by the Act when regard is had to the provisions of the Railways Clauses Consolidation Act. That point apparently took the defendants somewhat by surprise, though I understood from the plaintiffs' leading counsel on the last hearing that a notice had been given that the point would be made, and thereupon in order to meet it the case had to stand over again. It stood over until last week, when all points connected with that part of the case were finally argued. So, although there has been a very long discussion in various respects of this case, numberless points really have cropped up in the course of it, and there is no doubt, I think, that it is in a state of considerable perplexity. But after giving it the best consideration I can, it seems to me that certain broad points emerge from the obscurity of the various Acts of Parliament and the statutes, and that things that had originally been contemplated to be done have in fact been done.

Now I propose to deal with the first broad point taken by

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counsel for the plaintiffs that the defendants are not a public authority within the meaning of the statute of 1893. Although the word "person" is there used, I think it is clear that the Act relates to public authorities, and the conclusion to which I have come is based on a consideration of the Act of Parliament which relates to this particular structure, and also to the general position and powers of the Tyne Commissioners. To establish this point it is necessary to refer—I do not mean to do it in any great detail—broadly to the Acts under which the Tyne Commissioners were constituted. The first of those is the River Tyne Improvement Act, 1850 (13 & 14 Vict. c. lxiii.), which recites that "The mayor, aldermen, and burgesses are willing, on the terms herein expressed, that commissioners be appointed for carrying into execution some of the provisions and purposes of this Act, and that the authorities, duties, and obligations of the mayor, aldermen, and burgesses, as the conservators of the port, so far as in this Act expressed, be transferred to and imposed on such commissioners, and that for the purpose of providing a fund expressly for the improvement and conservancy of the port and of the river, a certain portion of the dues received by and belonging to the said mayor, aldermen, and burgesses, subject as hereinafter mentioned, should be placed at the disposal of such commissioners for the purposes of such improvement and conservancy." Sect. 10 appointed the Tyne Improvement Commissioners, and s. 48 provides for the establishment of the Tyne Improvement Fund.

The next Act, of 1852 (15 & 16 Vict. c. cx.), gives further powers to the commissioners, including a power to levy tonnage rates upon vessels entering the port. Sect. 33 says: "That from and immediately after the passing of this Act it shall be lawful for the commissioners to demand and receive for every vessel which shall enter within the limits of the port of Newcastle-upon-Tyne the sum of one farthing for every ton burden which such vessel shall measure or contain." Sect. 39 gives power to discontinue the same. Then there was power given by s. 63 to levy pier rates, and also by s. 66 to levy dock rates, and by ss. 68 and 70 there was a provision that they should lower their rates and dues according as they had a surplus, after paying all expenses.

Then in 1857 there was another Act (20 & 21 Vict. c. lxxi.), which conferred further powers, and by s. 8 incorporated the Tyne Improvement Commissioners, and they had powers to take rates for vessels and goods at the Coble Dean Docks, see ss. 42 and 43, and by ss. 52, 53, and 55 they were to lower the same as they had a surplus. Then there were several other Acts, called Tyne Improvement Acts, of 1859, 1861, 1865, and 1866, all giving further powers, and then we come to the Tyne Improvement Act, 1867 (30 & 31 Vict. c. cxxxv.), which is the important Act to consider in this case. By s. 2 of that Act the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated, and there is a recital to this effect: "And whereas the receipts and expenditure of the commissioners in relation to the Northumberland Docks are directed to be kept separate from the other receipts and expenditure of the commissioners, and the rates, tolls, duties and monies received in respect of the Northumberland Docks are carried to the account of a fund which is in this Act called the Northumberland Dock Fund: And whereas the accommodation provided in the Northumberland Docks has become inadequate for the increased and increasing trade on the northern side of the river Tyne, and it is expedient that the commissioners be authorized, in connection with the Northumberland Docks, to erect and provide such shipping staiths and works on or near the river Tyne as are by this Act authorized, and to connect the same by means of railways with the Blyth and Tyne Railway, the Cramlington Railway, the Backworth Railway and the Brunton and Shields Railway: And whereas it is expedient to make such provision in respect of the cost of the works by this Act authorized, as in this Act expressed, and that the application of the surplus revenues arising from the Northumberland Docks, and the appropriation of certain monies out of the Tyne Improvement Fund, provided for in the Tyne Improvement Act, 1861 (in this Act called the Act of 1861), and the Tyne Improvement Act, 1865 (in this Act called the Act of 1865), be respectively altered: And whereas plans and sections describing the lines and levels of the several railways and works by this Act authorized, and the lands to be taken

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or used for the purposes thereof, with books of reference to the plans, have been deposited with the respective clerks of the peace for the county of Northumberland and for the county of the town of Newcastle-upon-Tyne, and are in this Act referred to as the deposited plans, sections, and books of reference: And whereas it is expedient for the purposes aforesaid and other objects of this Act to confer on the commissioners such further powers as are in this Act mentioned." Then follow the usual provisions as to the enactments. That shews the object of the Act. Then s. 8 is as follows: "Subject to the provisions of this Act and the Acts incorporated herewith, the commissioners may enter upon, take, and use such of the lands described on the deposited plans, and in the books of reference thereto, as may be requisite for the purposes of this Act, and in and upon or under those lands respectively may make, maintain, and execute the several works by this Act authorized to be executed (such works not to include the Railway No. 3 on the deposited plans), and respectively within the limits of deviation, and according to the lines and levels shewn on those plans and sections." And in s. 10, towards the latter part of it, there is a provision for a diverging line of Railway (No. 8). It says: "A diverging line of Railway (No. 8) one furlong four chains and twenty-five links in length or thereabouts, commencing in the said township of Chirton, by a junction with Railway No. 4, and terminating on a shipping staith to be constructed on the said river in connection with and for the purposes of Railway No. 8, in the said township of Chirton and parish of Tynemouth, and in the said township and parish of St. Nicholas, or some or one of them." That, I understand, is an authorized railway, No. 8, which has been contemplated. Then towards the very end of s. 10 there is specified work to be executed: "A wharf or quay, with tramways and other works, commencing at or near the timber platform, and terminating at or near Whitehill Point aforesaid, all in the said township of Chirton and parish of Tynemouth, and in the said township and parish of St. Nicholas, or some or one of them. Staiths for shipping coals in the river Tyne in the said township of Chirton and St. Nicholas and parishes of Tynemouth and St. Nicholas, or any of them, in

connection with, and for the purposes of, railways numbers 4, 5, 6, 7, and 8." That deals with the railways and staiths as originally contemplated; and then there is a provision in s. 11 to which it is important to refer, and which is stated in the margin to be for the protection of the Duke of Northumberland. It says: "The following provisions shall be in force for the protection of the said Duke, his heirs, assigns, and successors in estate: 1. The lands authorized to be purchased and taken under the provisions of this Act shall be used in such manner as the commissioners shall see fit for the purposes of promoting, extending, and improving their undertaking, but the commissioners shall not on any portion of the land purchased or taken from the said Duke, construct, or permit to be constructed, any railways other than those authorized to be constructed by this Act (including all necessary works and conveniences connected therewith) without the previous consent in writing of the said Duke, his heirs, assigns, or successors in estate, first had and obtained." And: "4. The commissioners shall not sell any part of the land purchased under the provisions of this Act without the licence of the said Duke, his heirs, assigns or successors in estate, in writing for that purpose first had and obtained." I think that is all that I need refer to on the matter of structure. But there are one or two other sections that should be mentioned. The first is s. 15, which provides for a period for the completion of the works authorized by the Act within seven years from the passing of the Act. There was a point made about this which I may as well dispose of now. It was that the powers given by the Act had lapsed because the seven years had expired within which the works were to be completed. But I think that is really made an end of by s. 45 of the Tyne Improvement Act, 1897 (60 & 61 Vict. c ccix.), which says: "Section 7 of the Tyne Improvement Act, 1886, is hereby repealed, and in lieu thereof it is hereby enacted that the time limited by any of the Tyne Improvement Acts, 1850 to 1890, for the completion of any of the works authorized by any of such Acts save the deepening and dredging of the bed of the river, to which no limit of time is applicable, is hereby extended until the expiration of ten years from the passing of this Act,

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and the Tyne Improvement Acts, 1850 to 1897, shall be read and have effect accordingly." The point was therefore made that that was too late for an Act of Parliament after the powers had expired to do what the section purported to do; but that seems to me an untenable proposition, because the effect would have been absurd if it were read in that way, and no effect would be given to the section. To my mind it extends the powers conferred upon the Tyne Commissioners in its terms.

Going back to the Act of 1867, the sections upon the question of public authorities are important; s. 23 gives the commissioners a right to take the same dues on vessels using any shipping staith as if the vessel had entered the Northumberland Docks and gives them power to levy further dues under s. 24; and s. 25 gives them power to vary the rates, so that they do not exceed the sums specified in the schedules to the Act. Sect. 27 provides that "The tolls, rates, and duties received by the commissioners under the authority of this Act shall be carried to the credit of the Northumberland Dock Fund, and shall form and be part of that fund, and such fund shall be applicable to the purposes of this Act in preference to the purposes of the Act of 1861." There is another Act of 1870, which I do not think has any real bearing on this case; but there is an Act of 1872 (35 & 36 Vict. c. cxxxi.), which is important. It incorporates, by s. 2, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. The marginal note to s. 4 is: "Works authorized by this Act." And the section says: "Subject to the provisions of this Act, and the Acts incorporated herewith, the commissioners may enter upon, take, and use such of the lands described on the deposited plans and books of reference as may be requisite for the purposes of this Act, and in and upon or under those lands respectively may make, maintain, and execute the several works by this Act authorized to be executed, and respectively within the limits of deviation, and according to the lines and levels shewn on the deposited plans and sections." Sub-s. 2 runs: "A quay or river wall, with tramways or railways and other works connected therewith in the townships and parishes aforesaid, or some or one of them, commencing at the east end of the new quay in the course of

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construction by the said commissioners, near to Whitehill Point, and terminating at the entrance of the said dock or docks at or near Coble Dene aforesaid." That is the quay, or river wall, which extends to the east and west of the spot where this staith is. Then s. 5 is important. It is stated in the margin to be for the protection of the Duke of Northumberland, and it recites: "Whereas the Most Noble Algernon George Duke of Northumberland is or claims to be the owner of nearly the whole of the lands which the commissioners are authorized to take by compulsory purchase for the purposes of this Act, and it is expedient to make provision for the protection of the said Duke, his heirs, assigns, and successors in estate. Therefore the following provisions shall be in force for the protection of the said Duke, his heirs, assigns, and successors in the said estate: (1.) The land of the said Duke of Northumberland authorized to be purchased and taken by the commissioners under the provisions of this Act shall be used in such manner as the commissioners shall see fit, but only for the purposes of promoting, extending and improving their undertaking." Then sub-s. 2 says: "The commissioners shall construct a quay and dock within the limits shewn on the deposited plan, and shall, in or upon the land to be acquired by them as aforesaid under the authority of this Act, and on the land which has been acquired by them under the authority of the Act of 1867, construct and maintain in such manner as they shall arrange, all requisite railways, railway approaches, and shipping places in connection with the said quay and docks, with all necessary sidings, standage, and conveniences." And then it proceeds to enact that the Duke shall be permitted to form junctions and so on; and winds up, "and all persons using such quay, dock, railway, sidings, and conveniences provided by the commissioners under this Act, or the Act of 1867, shall pay dues to the commissioners, as authorized by this Act, or the Act of 1867."

In s. 12 there is a provision for the consolidation of the various funds of the Tyne Commissioners, and by s. 14 there are powers to borrow on the security of the consolidated fund. In s. 32 there is a time limit imposed, and the point with regard to that I have already dealt with. Sect. 33 provides that the same rates

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and duties as are payable in respect of the Northumberland Docks are to be payable in respect of vessels using the dock or docks authorized by the Act, or any shipping staith, quay or wharf provided by the commissioners under the powers of the Act, and so on. Sect. 34 provides for additional rates to be recoverable; and s. 35 gives power to vary all or any of the sums specified in the schedules to the Acts of 1852 and 1867 respectively. I think now I have read all that it is necessary to refer to in that Act. There are several other Acts which I pass by giving powers, and dealing with rates and borrowing powers, and so forth. In the last Act of 1897, to which I have already partly referred in connection with the extension of time, there is only one other section which I wish to cite, and that is s. 70, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847. It says: "The Tyne Improvement Acts, 1850 to 1890, shall be read and have effect as if each of them had contained a declaration that the Harbours, Docks, and Piers Clauses Act, 1847, was incorporated therewith, except the words 'authorizing the construction or improving of an harbour or pier' in clause 2 of that Act, and the Harbours, Docks, and Piers Clauses Act, 1847, is incorporated with this Act, except the same words." And there is a proviso which I do not think bears upon the present question. Sect. 71 only completed this matter of the incorporation of the Harbours, Docks, and Piers Clauses Act. It is necessary to see what there is in the Harbours Act of 1847 (10 & 11 Vict. c. 27), which bears upon this case, and the only section to which I think it is necessary to refer is s. 33, which provides that "upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." Then a subsequent section (s. 34) deals with the collection and recovery of rates.

I think I have now stated the position of the legislation so far as it is necessary to consider the first point, viz., whether this is a public authority or not. It seems to me clear from the general review of the Acts which I have made, bearing in mind the whole sections of the various Acts which shew the scheme, that this body is a public authority. They are

the conservators of the port; they have power to levy tolls for various purposes; they have power to borrow money for various purposes; and there are, as I have shewn, schemes in the sections for keeping the rates down as there is an increase of work at the port, and there is nothing whatever to shew that anybody is in a position to make any personal gain, or profit, out of the working of these Acts. They are clearly, I think, a public authority, and as fully conservators of this port almost as it is possible to conceive; so that my view is entirely against the plaintiffs upon this first general point.

Counsel for the plaintiffs took a further point, viz., that there is no case in which a body other than a municipal corporation had been held to be a public authority within the meaning of the Act of 1893, and therefore the present defendants are not a public authority within the meaning of the Act. I cannot agree with that view, because I find that in several cases bodies, who I think can hardly be considered as municipal, have been treated as public authorities. For example, in the case of *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (1), the Court of Appeal gave the defendants their costs as between solicitor and client under the Act. The highway authority there might, perhaps, be termed popularly a municipal corporation, but not in the strict sense. Again, in the case of *Sharpington* v. *Fulham Guardians* (2) the arguments were really unnecessary unless the Act was applicable. Again, there is the case of *Parker* v. *London County Council* (3), which followed the case of *The Ydun*. (4) These cases seem to me to fortify the view I have taken; but in the course of the argument I asked: What would be the position of the Mersey Docks and Harbour Board, a very striking example, in the case of an action brought against them? I find upon looking into the matter carefully that there is actually a decision on this point, and that is the case of *Williams* v. *Mersey Docks and Harbour Board*. (5) I find that it was not disputed that the defendants were a public authority within the meaning of the Act. The case dealt with another point, but that

(1) [1898] 2 Ch. 603.
(2) [1904] 2 Ch. 449.
(3) [1904] 2 K. B. 501.
(4) [1899] P. 236.
(5) [1905] 1 K. B. 804.

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point was admitted in the course of the case, and I should have thought it was perfectly clear. I think, therefore, that that point, attempted to be made by counsel for the plaintiffs, fails, and that the defendants are a public authority, and that the Act is not limited in the way suggested.

The next point taken was that even although in one sense they might be called a public authority, yet the Act of 1893 did not apply for the reasons which are given in the case of *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour*. (1) That case was relied upon, and counsel for the plaintiffs said that this body of commissioners was not capable of being treated on a different footing from the proprietors of the Margate pier and harbour. I do not take that view, and it was for that reason that I went through the sections of the Act. The reason why that case was decided in the way that it was was this: Kekewich J. says, at p. 753 of the report: "They are a company for maintaining the pier and the harbour. Piers and harbours are no doubt works of great importance to the public, and the maintenance of them is for the public utility. So is a railway, so is a tramway, so is a canal; and one might mention other things in the same category. The company are to spend their money in paying interest on charges, they are to keep up their pier and harbour, and beyond that, except that . . . . there is to be a sinking fund provided, they are a commercial company intended to earn, and, in fact, earning, dividends year by year for the benefit of the shareholders. I do not see myself the distinction between that and a railway company incorporated by special Act with reference to the Lands Clauses Act, and the Railways Clauses Consolidation Act, 1845, and subsequent Acts."

The real basis of that decision is that the Margate Pier and Harbour Company could not be treated as a public authority in respect of having done something in execution of their Act, or neglecting their duty under their Act, because the company was merely a commercial undertaking. The distinction between that case and this is obvious when all the Acts are considered, because this was an undertaking working for nobody's profit, simply

(1) [1900] 1 Ch. 749.

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working for the benefit of the public, and no pecuniary advantage was derived by anybody. There are borrowing powers, and persons lending the commissioners money will get interest on the money; but counsel for the plaintiffs endeavoured to point out that that makes it the same kind of case as the *Margate Case*. (1) To my mind it is not: these people are simply creditors, and nobody in this case takes any profit upon it as a commercial transaction. The result is that those points are, to my mind, all to be decided in favour of the defendants. I think counsel for the defendants summed up the point with regard to the *Margate Case* (1) in this way: that the body of commissioners rendered services with no idea of profit or private gain, or for the benefit of any particular persons—they simply rendered a public duty. I agree with that view. But I am afraid that that does not dispose of this case, because the next point taken was that there was no duty whatever upon the commissioners in connection with the matters complained of in this case. That appears to me to be erroneous when it is remembered that s. 33 of the Harbours, Docks and Piers Clauses Act, 1847, is incorporated in these Acts, and if this railway staith was authorized to be made by the private Act, the Harbours, Docks and Piers Clauses Act applies, and s. 33 applies, and s. 2 shews that it applies to any works authorized by the said Acts which have incorporated the Harbours, Docks and Piers Act; and so the commissioners, although it may be they were under no duty to create and construct the pier and staith, when they had constructed it and opened it to the public, had a duty under their Act to take proper care to keep it in such a state that ships should be in safety, and to entitle them to charge their tolls, and so forth. But that again does not make an end of this case, because the next point is one of considerable complexity, and it is this: that the staith was not made under the Acts or either of them, because counsel for the plaintiffs said (on the points that were taken about its structure to which I have already referred) that it is seven feet higher than shewn on the plan, and 200 yards away from the position which was shewn on the plan, and this point was made in consequence of the provisions of the Railways

(1) [1900] 1 Ch. 749.

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Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). I am afraid it will take too long to read those provisions through, but the sections relied on were ss. 11, 12, and 15. Sects. 11 and 12 deal with this, that the company which is making the railway authorized is not to make it more than five feet higher in any place without getting the consent of the owners and occupiers of the land, and so forth, and if they can get those consents they still have to give public notice previous to making alterations. They have also to get a certificate from the Board of Trade, and s. 12 winds up with: "It shall not be lawful for the company to make such deviation except in conformity with such certificate." It is not said here that the commissioners had any certificate to increase the height more than five feet above the level shewn and make it up to seven feet, but I think it is tolerably plain from what took place afterwards in connection with the Act of 1872 that they had practically the consent of the surrounding landlord, who was only in this case the Duke of Northumberland. That is the practical position, having regard to the Act of 1872. Then s. 15 provides that it is not lawful for the company to deviate from the line delineated on the deposited plans "to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon than ten yards, or elsewhere to a greater extent than one hundred yards from the said line." The point therefore is made that under those provisions this staith and railway, as in fact constructed, as above stated, are wholly unauthorized structures. There is no doubt that this is a difficult point, and there are numberless cases in connection with this subject in which railways and other companies have exceeded the strict limits of what is stated by their Act and by the sections to be lawful. But I think it is difficult to find anything to shew that there was any effectual remedy or restraint on this except for the benefit of those persons who are affected by what they have done; and a case which was cited in the course of the argument before me, namely, *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (1), contains one or two passages in the

(1) [1892] A. C. 498.

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judgments, one in that of Lord Halsbury and one in that of Lord Watson, which deal broadly with this class of point. Lord Watson, for instance, says at p. 521 of the report: "The only remedy which a Court can give is by enjoining the respondents to desist from interfering with the water of the river Dodder until the Act has been complied with, and in my opinion the appellants are entitled to that remedy." I have looked through a great many cases on this subject, and all appear to me to be cases in which somebody had a grievance either by the water being cut off or complained of the increase of height, deviation, and so on, for which they sought to get an injunction to restrain a company from doing that which is complained of, but I confess I have very considerable difficulty in working that out sufficiently in this case—that is to say, that when a railway and staiths are within the limits of deviation on land taken for the purpose, where nobody has complained, when the commissioners themselves cannot say they have done what is wrong, and when the plaintiffs in this case are taking advantage of the staiths, I think it is extremely difficult to make out that this is such a wholly unauthorized structure that the commission ought no longer to be treated as a public authority acting under the Act and ought no longer to have the benefit of the Public Authorities Protection Act, the plaintiffs not complaining of an act done in the execution or intended execution of the defendants' powers, nor of any neglect or default of what has been done under their powers, but alleging that everything done was wholly unauthorized. It seems to me that that is too strong a proposition to be reasonably maintained; but even if that be not a correct view of the effect of the Railways Clauses Consolidation Act on the Act of 1867, there still remains a very strong point in favour of the defendants in relation to the Act of 1872, which in terms gives authority, and not only authority, but more than authority, for, as I have already mentioned, it enacts that: "The commissioners shall construct a quay and dock within the limits shewn on the deposited plan, and shall, in or upon the land to be acquired by them as aforesaid under the authority of this Act, and on the land which has been acquired by them under the authority of the Act of 1867, construct and maintain in

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such manner as they shall arrange, all requisite railways, railway approaches, and shipping places in connection with the said quay and docks, with all necessary sidings, standage, and conveniences." Even if it be contended that those provisions relate to the protection of the Duke of Northumberland, they may involve something more, especially when I observe that at the close of sub-s. 2 of s. 5 of the Act of 1872 there is a provision that all persons who use the quay, dock, or railway and conveniences provided under this Act or the Act of 1867, shall pay dues to the commissioners authorized by that Act and by the Act of 1867. Possibly that section was only put in with a view of dealing with the Duke's position, but it seems to me to go beyond the mere limit of his protection, and that the railway and staith in this case may be treated as having been constructed under the powers which are there contained. But I ought not to omit to say that the only answer that was made to this point that I could appreciate—unless, perhaps, the point was made that this was only for the protection of the Duke—was that the staith and railway were not in connection with the quay, the works being railway and other works connected therewith, and that s. 5, sub-s. 2, says: "Railways, railway approaches, and shipping places in connection with the said quay and docks." On that sub-section counsel for the plaintiffs contended that the quay and railway were not connected at all, that the one was not connected with the other because the supports of the railway staiths, although on the quay, were supporting a railway staith above the quay, and if you were going over the top of the quay you were not going on anything connected with it. I confess, to my mind that is too great a refinement. It appears to me that when there is a quay, and that quay is a shipping place alongside which vessels come, it is a work of convenience connected with the quay, because that is practically the only way in which the quay is used, and therefore I am prepared to decide this case on the ground, so far as this point is concerned, that the work may be reasonably treated to be authorized by the Act which confers their power on the commissioners. It would be a very awkward thing indeed for the commissioners if it were not so, because then they would have no right to levy any tolls.

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There is one other point to which I should wish to refer, though it may not be necessary to express a definite opinion upon it, but it is on the terms of the Act itself of 1893, from which it appears that the object is to give protection against "any action, prosecution or proceeding" in respect of any act done in pursuance, or execution, or intended execution of, &c. On this, counsel for the defendants contended that, even if it could be successfully established that these works were not strictly authorized by the Act, they were done, at any rate, in intended execution of an Act of Parliament, and of a public duty, or authority. The answer made by counsel for the plaintiffs was that that could only be a sound point if the duty were in fact established; that is to say, that unless there were a structure made within the terms of the Act so as to bring in the Harbours, Docks, and Piers Clauses Act there never was any duty at all, and therefore, as the matter was a wholly unauthorized structure, the Act could not apply. I am not quite sure that that answer is a sound one. I think possibly if these sections are construed without the light of the decisions upon them it might be said that the words "act done" meant something that was being complained of, not in the negligent way in which the act was done, but in fact that the act was done itself either in pursuance, execution, or intended execution of the Act of Parliament, or public duty, or authority; and that the latter part of the section dealing with something which is done where the proceeding is in respect of a neglect, or a default in the execution of such act, duty, or authority, might be limited to a case where there was in fact a constituted duty, or authority. But there is one case which seems to go a little further than that view, though not on this particular section, and that is the case of *Jolliffe* v. *Wallasey Local Board*. (1) The Wallasey Local Board had erected a pier at New Brighton, and had placed an anchor out which was part of the means of keeping the pier in its place, and had neglected properly to buoy the anchor. One point taken in that case was that all the material part of the works were outside the powers of the Wallasey Local Board, and that, at any rate, even if they were within the powers of the Wallasey Local Board the neglect

(1) (1873) L. R. 9 C. P. 62.

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to put a buoy was not an act done; the act done was putting the anchor, and what was complained of was, not putting the anchor, but neglecting to buoy it. That case does not really distinctly decide what is necessary for the present case, because I think the Court held that the works were in fact authorized by the Acts which gave the power to erect them, but they did decide this further, that an act done includes not only the act itself but the negligently doing of the act, and there are several passages in the judgment of Keating J. and Brett J.—as he was then—afterwards Lord Esher, which shew that the words "act done" are not limited merely to the doing of the act, but doing it in an improper manner, and at p. 88 of the report the late Lord Esher says this: "But Mr. Aspinall takes another point. He says that, as the anchor was negligently placed out of the limits of the board's jurisdiction, the omission to mark its position could not be a thing done, or intended to be done, under the provisions of the Act; that is to say, that, though a negligent omission may give them a right to notice, yet for a negligence upon a negligence they are not entitled to notice. That proposition cannot, as it seems to me, be maintained. All the conduct which gave rise to the cause of action was something which was bona fide intended to be done by the defendants under the provisions of the Act." Well, if that be strictly applicable to the section under consideration of the Act of 1893, it is an authority in favour of the defendants. Speaking for myself, I should have thought that it was, to say the least, doubtful on that section. Where you have to contrast between the act done, which is complained of, and neglect or default which is complained of, different considerations might apply, and I only deal with the point rather for the purpose of noticing it, and shewing that I have not neglected it before concluding my judgment, because the defendants' position seems to me to be covered by what I have already said. It is, however, possible that this section may be construed so as to give protection to a body in the position of the defendants if they do something in the honest belief that their Acts are being complied with, and intend to comply with them, and then a complaint is made that they have not done what they ought to have done,

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and have not done properly what they have in fact done. They require this protection if they have any protection as a public authority at all, just as much as if they are being sued for neglect of an admitted duty.

I prefer, however, to place my judgment on the other points of the case, because I think they are more important to the commissioners. For these reasons I am of opinion that the commissioners are entitled to have their costs taxed as between solicitor and client. Judgment has already been entered for them, but it must be added that they are to have their costs on that footing, and in taxing the costs the registrar will do so on the assumption that the arguments which began after May 22 were continued without a break and finished within a reasonable time.

Solicitors for plaintiffs, the owners of the steamship *Johannesburg: Ince, Colt & Ince.*

Solicitors for defendants, the Tyne Improvement Commission: *Thomas Cooper & Co., for Clayton & Gibson, Newcastle-upon-Tyne.*

T. L. M.

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Nov. 27;
Dec. 10.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF OXFORD *v.* HENLY.

Ecclesiastical Law—Criminal Suit by Letters of Request—The Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86), *s.* 13—*Proceedings by Default—Evidence — Admissions by Respondent before Institution of Suit — Reservation of the Sacrament of the Supper of Our Lord—Articles* 25 *and* 28 *of the Articles of Religion—Monition.*

The reservation of the Sacrament of the Lord's Supper is unlawful.

The incumbent of a parish church was charged in the articles in a criminal suit by letters of request promoted by the bishop of the diocese with having offended against ecclesiastical law by having on a day specified within two years then last past, kept and caused and permitted to be kept in the parish church, after the service of Holy Communion ended, upon or over the altar part of the bread and wine consecrated at a celebration of the Holy Communion, and kept burning and caused and permitted to be kept burning a light immediately in front of the said consecrated bread and wine. The incumbent did not appear, and, the articles having been admitted to proof, evidence was given at the hearing that on the day specified in connection with the above charge, the suffragan bishop in the diocese, having been present in the church and told by the respondent that the sacrament was reserved there and that it was therefore necessary to genuflect before it, had seen the light hanging in the church near the altar, in front of and above it, and the genuflections made by the choir as if they had been properly trained. Evidence was also given that in consequence of a communication from the suffragan bishop correspondence had taken place between the promoter and the incumbent before the institution of the suit, and that the incumbent had stated in one of his letters forming part of that correspondence, in reply to a question by the promoter, that the Sacrament had been reserved on or close above the altar at the parish church on the day above referred to, and that a lamp was burning before it, and the choir was trained to genuflect before it.

The Court, being of opinion that the incumbent had been charged with an ecclesiastical offence, and that that offence had been sufficiently proved, directed a monition to issue to him requiring him to abstain from keeping or causing and permitting to be kept in his church, either over the altar or elsewhere, bread and wine which had been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration, and also from keeping burning or causing or permitting to be kept burning a light in front of the said consecrated bread and wine.

This case, in which the office of the judge was promoted by the Bishop of Oxford against the Reverend Oliver Partridge Henly,

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vicar of the church and vicarage of Wolverton St. Mary, in the county of Buckingham and diocese of Oxford, came before the Court by virtue of letters of request signed, on June 20, 1906, by the Bishop of Oxford in the first instance under the 13th section of the Church Discipline Act, 1840.

The letters of request having been carried in on June 30, 1906, and accepted by the Dean of the Arches on July 9, 1906, a decree by letters of request issued from the registry, and was duly served on the respondent, the Reverend O. P. Henly, on July 13, 1906. No appearance was, however, entered for the respondent, and on August 10, 1906, the articles in the suit were brought in. These articles, as amended and admitted to proof on October 29, 1906, alleged in the first four articles, so far as material to this report, as follows :—

1. "That by the Book of Common Prayer and administration of the Sacraments and other rites and ceremonies of the church according to the use of the Church of England and by" the Act of Uniformity, 13 & 14 Car. 2, "and by the several Acts of Parliament confirmed and applied by the said Act for the establishment and confirming of the said book, and by" the 14th canon of the Canons and Constitutions of 1603, "every priest of the Church of England celebrating the Holy Communion is bound immediately after the blessing himself with such other of the communicants as he shall then call unto him reverently to eat and drink any that may remain of the bread and wine consecrated at such celebration of the Holy Communion, and that by the said Book, Acts, Constitution and Canon and by the 28th Article of Religion, it is unlawful to reserve or keep after the service of Holy Communion ended any of the bread and wine consecrated at such service, and that any priest of the Church of England offending against the said Book, Acts, Constitution, Canon or Article ought to be punished according to the gravity of his offence and the exigency of the law."

2. This article contained allegations that the respondent was a priest of the Church of England and was during the whole of the year 1905 and had ever since been and at the date of the administration of the articles still was the lawful vicar and incumbent of the church and parish of Wolverton St. Mary aforesaid.

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3. "That on December 27, 1905, being the feast of St. John the Evangelist, the said O. P. Henly, having celebrated the Holy Communion in the church of the said parish of Wolverton St. Mary, did not immediately after the blessing consume nor allow nor cause to be consumed the whole of the consecrated bread and wine which remained after the blessing, but reserved unconsumed in the said church part of such consecrated bread and wine.

4. "That on the feast of St. John aforesaid the said O. P. Henly kept and caused and permitted to be kept in the church of the said parish after the service of Holy Communion ended upon or over the altar part of the bread and wine consecrated at a celebration of the Holy Communion and kept burning and caused and permitted to be kept burning a light immediately in front of the said consecrated bread and wine."

Of the remaining four articles, articles 5, 6, and 7 contained charges against the respondent to the effect (art. 5) that on Sunday, January 7, 1906, and on every succeeding Sunday in that year down to and including Sunday, April 15, being Easter Sunday, the respondent, having celebrated the Holy Communion in the parish church, did not immediately after the blessing consume, nor cause nor allow to be consumed, the whole of the consecrated bread and wine remaining after the blessing, but reserved unconsumed in the church part of such consecrated bread and wine; (art. 6) that on each of the days between the dates in the last article mentioned, both inclusive, the respondent kept and caused and permitted to be kept after the service of Holy Communion ended, upon or over the altar, with a light kept burning immediately in front, bread and wine consecrated at celebrations of the Holy Communion; and that (art. 7) the respondent did and left undone all the things in the two last preceding articles mentioned contrary to the express prohibition of the bishop of the diocese.

The 8th article pleaded that, by reason of the letters of request having been duly presented and accepted and of the premises, the respondent was subject to the jurisdiction of the Court; and the articles concluded with a prayer that on proof of the premises, so far as in law should be necessary, the Court

would be pleased to pronounce that the respondent had offended against the law in some one or more or all of the particular matters alleged in the articles, and to decree that the respondent be duly and canonically punished and be condemned in the costs of the suit.

Nov. 27, 1906. The suit was heard before the Dean of the Arches (Sir Lewis T. Dibdin, D.C.L.).

G. J. Talbot, K.C., appeared for the promoter, the Bishop of Oxford.

The respondent was called into Court, but did not appear.

Three witnesses, namely, the promoter, the Registrar of the Diocese of Oxford (J. M. Davenport, Esq.), and the Bishop of Reading, suffragan bishop in the Diocese of Oxford (the Right Rev. James Leslie Randall), were called as witnesses in support of the articles other than the 3rd and 5th articles (as to which last-mentioned articles no evidence was offered), and were examined orally in Court. The Registrar of the Diocese of Oxford proved that the respondent had been duly licensed to the perpetual curacy of Wolverton St. Mary in the year 1897, after having made the subscription and declaration required by law, and was still the incumbent of that parish. The evidence given by the promoter and the Bishop of Reading is fully stated in the judgment, together with the dates and material contents of the following letters, forming part of a correspondence which took place before the institution of the suit between the Bishop of Oxford and the respondent in relation to the conduct of the respondent and the charges subsequently made against him in the articles: Letters written by the Bishop of Oxford to the respondent on December 31, 1905 ; January 5, 1906 ; January 20, 1906; and April 7, 1906; and letters written in reply by the respondent to the Bishop of Oxford on January 2, 11 and 23, 1906, and April 21, 1906, respectively. All these letters were admitted in evidence. (1)

(1) The original letters written by the respondent were produced, but a compulsory to produce the original letters written by the Bishop of Oxford having been served on the respondent and disobeyed, secondary

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G. J. Talbot, K.C., on behalf of the promoter. The Court is only asked to pronounce that the respondent has committed such of the offences charged in the articles as are proved by the evidence of the Bishop of Reading and the statements and admissions made by the respondent in his letters to the Bishop of Oxford in relation to the matters there charged. The Bishop of Reading has proved that on attending at Wolverton St. Mary church, on December 27, 1905, and being then told by the respondent that the sacrament was reserved in the church, and that it was necessary to genuflect before it, he saw the lamp hanging near the altar, in front of and above it, and that the choir in entering the church made their genuflections as if properly trained. The reservation of the sacrament on the same day was also distinctly admitted by the respondent in his letter of January 2, 1906, to the Bishop of Oxford, and it is also plain from the respondent's other letters put in in evidence that the respondent, in spite of the commands of his diocesan, refused to abandon the practice of the reservation of the sacrament at Wolverton St. Mary church, a practice admitted by him to have been commenced there at Easter, 1904. It is therefore submitted that articles 4, 6, and 7, have been sufficiently proved. As to articles 3 and 5, no evidence is offered in support of them, the promoter having shrunk from being a party to obtaining any direct evidence other than that before the Court lest any irreverence in connection with such matters as are involved in this suit should be regarded as thereby involved, or the promoter, as bishop of the diocese, be placed in a wrong position with regard to the respondent or the parishioners of Wolverton St. Mary.

All the acts charged in articles 3—7, both inclusive, as done or omitted to be done by the respondent constitute offences against ecclesiastical law, but it is only necessary to consider the law relating to the charges contained in articles 4, 6, and 7, as to which evidence has been offered, and of these charges, that contained in article 7, with reference to the disobedience of the

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evidence of the contents of such last-mentioned letters was given, copies or drafts thereof having been made by the Bishop of Oxford or one of his household at the time, to the accuracy of which copies or drafts the Bishop of Oxford was able to give evidence.

respondent to the directions of his diocesan, is plain and depends entirely on the charges in articles 5 and 6 being held to be charges of ecclesiastical offences.

[THE DEAN OF THE ARCHES. With reference to the charge made in article 6, what evidence is there before the Court to establish that the practice of reservation was maintained as alleged in that article on either the dates there mentioned or on any day or days between these dates?]

There is an admission in the respondent's letters of what is practically a practice of perpetual reservation, at Wolverton St. Mary, since Easter, 1904, and thus, it is submitted, sufficient proof of the article is afforded.

But, however this may be, article 4 has been clearly proved, and under that article the question of the illegality of the respondent's conduct is directly raised.

This question, which touches no point of doctrine, does not interfere in any way with the communion of the sick, and merely concerns a matter ordained by man's authority and therefore one which every national church has power to ordain or abolish (34th Article of the Thirty-nine Articles of Religion), is a question on which the Church of England has pronounced without ambiguity prohibiting entirely the reservation of the sacrament of the Lord's Supper. No doubt reservation of the sacrament was lawful in this country before the Reformation, but it is unlawful now, first, under the rubrics of the present Prayer Book, the Canons of 1603 and 1865 (Canon 14 of the Canons of 1603, and Canon 36 of the Canons of 1865); secondly, under the Acts of Uniformity—Acts passed at the instance of the Church of England, and being the sanction attached by Parliament to the Church's law of worship; and thirdly, by Articles 25 and 28 of the Thirty-nine Articles of Religion, the latter of which two Articles declares in express terms as follows: "The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

The first Prayer Book of Edward VI. allowed of reservation of the sacrament on the same day as a communion service had been held and for the benefit of the sick, but no other mode of reservation was even then left lawful, and on the second Prayer

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Book of Edward VI. superseding the first Prayer Book of that reign the reservation so allowed under the rubrics of the last-mentioned book was abolished. No change was made in the English Prayer Book of Queen Elizabeth, and the present Prayer Book follows the text of the second Prayer Book of Edward VI. so far as the matter at issue here is concerned, except that the rubrics in the Communion Service are made more clear. Indeed, of the final rubrics in the Communion Service, there is one quite conclusive against the contention that "reservation" may be lawfully used in the Church of England in any circumstances: that rubric providing as it does in terms that "if any of the bread and wine remain"—after the Communion Service ended—"unconsecrated the curate shall have it for his own use: but if any remain of that which was consecrated it shall not be carried out of the church, but the priest and such other of the communicants as he shall then call unto him, shall immediately after the blessing reverently eat and drink the same."

The observance of this rubric, together with the rest of the Communion Service, is enjoined and provided for by the Act of Uniformity of Charles II. (13 & 14 Car. 2, c. 4), s. 24, and by the provisions of Canon 14 of 1603, and Canon 36 of 1865 (see also 1 Eliz. c. 2, ss. 3, 4; 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1, as to the obligation to obey the provisions contained in the Edwardian and Elizabethan Prayer Books).

As the prohibition of reservation does not interfere with the communion of the sick, with reference to which in all cases a special celebration at the sick man's house is directed, there is no validity in the objection that to prohibit the practice of reservation prevents the sick from being communicated and is therefore ultra vires of the Church of England. With regard, too, to the argument that there is in the present Prayer Book no express prohibition of reservation, and that therefore the old law as to the practice of it is still in force, the alteration of the rubrics in the Communion Service and the omission of the rubrics in the first Prayer Book of Edward VI. relating to reservation are against any such contention having any force, whilst the opinion of those writers—such as Bishop Forbes: Considerationes Modestæ,

vol. ii.; De Eucharistia, bk. 2, pp. 538, 541, 543, 547 (Library of Anglo-Catholic Theology); and Thorndike, Works of, vol. v., ed. 1854; ch. xxxix., Of the Circumstances and Ceremonies of Divine Service, s. 4, p. 578 (Library of Anglo-Catholic Theology)—who have written in favour of reservation being permissible in the Church of England, have, to put it at the highest, no value if, as is plain, they had not before them the existing law of the Church, and were therefore mistaken in their opinion.

Those in favour of reservation have also relied on the following passage as to reservation in The Reformatio Legum Ecclesiasticarum, De Hæresibus, cap. 19, De Transubstantiatione in Eucharistia et impanatione, ut vocant, corporis Christi: "Itaque nec in altum tolli sacramentum hoc, nec circumferri per agros patimur, nec conservari in crastinum, nec adorari . . . ." and on the portion of the first Prayer Book of Edward VI. relating to reservation having been translated into Latin, and as so translated having been inserted in one edition of the Latin Prayer Book of Queen Elizabeth. But as far as the passage from the Reformatio Legum implies, as is not really the case, that a prohibition of reservation ad crastinum imports a permission to reserve on the same day, it is enough to say that the Reformatio Legum never came legally into force as an official document. As to the Latin Prayer Book of Queen Elizabeth, there is great doubt as to what, if any, legal authority is to be ascribed to it. (1)

There is, moreover, a passage in Sparrow's Rationale upon the Prayer Book somewhat difficult to be explained, having regard to the existing ecclesiastical law as to reservation, but whilst it is probable that the fact of Sparrow having made use in his work of the rubrics as to reservation contained in the first Prayer Book of Edward VI. was only for the purpose of finding out what prayers it would be right to use at a celebration in a case of sickness, it is clear that the law as to the prohibition of reservation in the Church of England cannot be altered, whatever may be the true explanation of the passage in

(1) See pamphlet on "The Reservation of the Sacrament," by J. S. Franey, pp. 53—64 (Bemrose & Son, London, 1900).

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question: see Sparrow's Rationale upon the Prayer Book, ed. 1672, p. 301; ed. 1722, p. 223. (1)

No authority is claimed for the decisions of the Archbishops of Canterbury and York at Lambeth in 1900, as in any way binding on this or any other ecclesiastical Court, but it may not be immaterial to notice that on that occasion the Archbishops of Canterbury and York both expressed the opinion that the Church of England does not allow or sanction the reservation of the sacrament of the Lord's Supper. (2)

[The following authorities were also referred to: Rules and Ordinances of the Arches Court, 1867, rules 19, 20; 36 L. J. Eccl. 1; Reichel, Complete Manual of Canon Law, ed. 1896, vol. i. p. 136 (Catholic Standard Library); Giraldus, Gemma Ecclesiastica, Dist. I., cap. 6 (21 Rolls Series; Giraldus Cambrensis Opera, vol. ii.); Catholic Directory by Addis and Arnold (ed. 1884); Voce, Reservation of the Holy Eucharist; Article 29 of the Articles of 1553; Bishop Beveridge, Discourse on the Thirty-nine Articles, Works, vol. vii. pp. 487—490; Bishop Cosin, Works, vol. v. p. 519; Pamphlet on the Reservation of the Sacrament, by J. S. Franey, Appendix XXXVI. p. 129.]

Cur. adv. vult.

DEC. 10, 1906. THE DEAN OF THE ARCHES. In this case the Reverend Oliver Partridge Henly, vicar of Wolverton St. Mary, in the diocese of Oxford, is the defendant, and the Bishop of Oxford is the promoter. The suit is brought to this Court by letters of request. Mr. Henly has been cited to appear in these proceedings, but he has not appeared. The offence charged against the defendant is, speaking generally, that he has "reserved" the blessed sacrament under circumstances which are alleged in the articles.

The rubrics of the Prayer Book are so constructed as to render reservation impossible without a clear breach of their requirements. First, the celebrant is directed when there is a

(1) "A Rationale upon the Book of Common Prayer of the Church of England," by the Right Reverend Father in God, Anthony Sparrow, late Lord Bishop of Norwich.

(2) See the opinions reported, *Times* newspaper, May 2, 1900.

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communion "to place upon the Table so much Bread and Wine as he shall think sufficient"; secondly, he is to consecrate "all the Bread" and Wine so placed; thirdly, if the Bread and Wine so consecrated "be all spent before all have communicated" more is to be consecrated"; finally, "if any remain of that which was consecrated it shall not be carried out of the church, but the priest and such other of the communicants as he shall then call unto him shall immediately after the Blessing reverently eat and drink the same."

We know from Bishop Cosin—Cosin's Works (Anglo-Catholic Library), vol. v., p. 519—that these rigorous directions as to consumption were inserted in the present Prayer Book in 1661 for the express purpose of ensuring that none of the consecrated elements should remain after the close of the communion service. The danger of irreverence rather than of superstition seems to have been present to the minds of the revisers at the particular date. But the course which they adopted to guard against this danger was to require that the consecrated elements should not be kept for any purpose.

Reservation for the Communion of the Sick was sanctioned under certain conditions in the first Prayer Book of Edward VI., but it was not authorized in the second Prayer Book of Edward VI. or in that of Elizabeth or James I., and in the present Prayer Book careful and definite provision is made for the Communion of the Sick by directing a celebration in "the sick man's house" and not by means of the reserved sacrament.

Prolonged reservation of the blessed sacrament placed in a tabernacle or hanging pyx over the altar and made an object of devotion or worship was, of course, common in English churches prior to the Reformation. The first Prayer Book of Edward VI. excluded this practice altogether by limiting the amount reserved to so much as would serve for the particular sick communion in contemplation, and by requiring the clergyman to take the sacrament to the sick person as soon as possible after the conclusion of the Communion Service, and in any case on the same day. Accordingly, public reservation ceased, and we find as one of the demands of the "Rebels" in the Western Rising of 1549, caused by the establishment of the first Prayer Book,

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the following: "We will have the sacrament hung over the high altar and there to be worshipped as it was wont to be"; to which Archbishop Cranmer replies: "Is this the holy catholic faith that the sacrament should be hanged over the altar and worshipped, and be they heretics that will not consent thereto?" (Cranmer's Works (Remains), p. 172).

The practice thus abrogated passed entirely out of use and, except during Queen Mary's reign, has never been revived until recent years. But the view of the Church of England that the blessed sacrament should not be used for any purpose apart from that of communion was not left to rest merely on the ceremonial directions of the Liturgy. It was very clearly stated in the Thirty-nine Articles of Religion. The 25th Article (the 26th of the Forty-two Articles of 1553) declares: "The sacraments were not ordained of Christ to be gazed upon or to be carried about, but that we should duly use them." The 28th Article (the 29th of 1553) declares: "The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." It will be observed that reservation is here specifically named. It cannot, I think, be questioned that the word used in this context points specially to the retention of the sacrament in the open church in the manner already described. The significance of the reference to "Christ's ordinance" is apparent directly we remember that the thought uppermost in the minds of those who compiled our formularies in the sixteenth century—a thought constantly expressed by them and clearly impressed on all their work, was to observe with regard to the sacraments as strict a compliance as possible with our Lord's directions and practice. Thus, in the 19th Article (the 20th of 1553), it is given as one of the notes of the visible church that "the sacraments be duly ministered, according to Christ's ordinance, in all those things that of necessity are requisite to the same." Again, the 30th Article (first introduced in 1563), which insists that the cup is not to be denied to the laity, does so on the ground that "both the parts of the Lord's Sacrament by Christ's ordinance and commandment ought to be ministered to all Christian men alike." The following extract from the Homily

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"Concerning the Sacrament," Part I. (1563) [The two Books of Homilies, ed. 1859, p. 440], may be quoted by way of illustration: "But, before all other things, this we must be sure of specially, that this Supper be in such wise done and ministered as our Lord and Saviour did and commanded to be done, as His holy apostles used it, and the good fathers in the primitive Church frequented it. For, as that worthy man St. Ambrose saith, 'he is unworthy the Lord that otherways doth celebrate that mystery, than it was delivered by him; neither can he be devout that otherways doth presume, than it was given by the Author.' We must then take heed, lest, of the memory, it be made a sacrifice; lest, of a communion, it be made a private eating; lest, of two parts, we have but one; lest, applying it for the dead, we lose the fruit that be alive. Let us rather in these matters follow the advice of Cyprian in the like cases: that is, cleave fast to the first beginning; hold fast the Lord's tradition; do that in the Lord's commemoration which he himself did, he himself commanded, and his Apostles confirmed."

The 25th and 28th Articles do not forbid "the gazing upon," "carrying about," "lifting up," "worship," or "reservation" of the blessed sacrament on the ground that there is any divine law directed to these particular observances, but rather on the ground that they lack the sanction of our Lord's words and acts; and the alteration of pre-Reformation practice thus involved is defended in principle by the 34th Article (this portion was added in 1563), which claims for every national church authority to abolish ceremonies ordained only by man's authority.

The only reasonable construction which can, in my opinion, be put on these two Articles (the 25th and 28th) is that they both mean the same thing, namely, that the practices mentioned are repudiated by the Church of England because they do not satisfy the condition of being according to Christ's ordinance.

It results from what I have said that—First, in my opinion it is impossible to reserve the blessed sacrament without a departure from the rubrics of the Prayer Book, and therefore without a breach of the Acts of Uniformity, which is an ecclesiastical offence.

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Secondly, the prolonged retention of the blessed sacrament over the altar in church in the manner common before the Reformation is not only inconsistent with observance of the rubrics of the Prayer Book, but is also, in my opinion, incompatible with adherence to the Articles of Religion. As I stated in the recent case of *The Bishop of St. Albans* v. *Fillingham* (1), it is no more competent for a clergyman to act in direct opposition to the Articles than to deprave them by word or in writing. To act thus is an offence against the common law of the Church of England.

Thirdly, I think that a clergyman charged with the cure of souls in a parish, who keeps in the church the consecrated elements which, unless a breach of the law had been committed, could not be in his possession, and keeps them (using for that purpose ornaments, e.g., a tabernacle and lamp, introduced without the sanction of the Ordinary) under such circumstances as readily admit of acts of adoration towards the consecrated elements, contrary to the rubric known as "the Declaration of Kneeling," commits an ecclesiastical offence which is distinct from the breach of the Acts of Uniformity caused by non-compliance with the rubric for consumption and distinct from the offence involved in the doing of any act condemned by the Articles of Religion.

I do not propose to discuss in this judgment many matters which might, no doubt, be treated—some of them have been so dealt with in the interesting and learned argument which Mr. Talbot addressed to the Court—as throwing side-lights on the questions before me. I refer to such matters as the works of contemporary writers during the periods 1549—52, 1559—1603, and 1661 onwards, the evidence of destruction or retention of pyxes and tabernacles in the sixteenth century, the draft code of Church law known as "The Reformatio Legum," Dr. Haddon's Latin translation of Queen Elizabeth's Prayer Book and his adoption into it of Aless' Latin translation of the Communion of the Sick in the first Prayer Book of Edward VI. with the reservation rubrics mentioned above, in lieu of a translation of the service as it appeared in Elizabeth's Prayer Book without those

(1) [1906] P. 163.

rubrics, and finally a rather obscure passage in Sparrow's Rationale of the Prayer Book as it stood before the last revision. (1) I have endeavoured to give to each of these points due consideration, but in my opinion, they do not on the whole tend to disturb but rather to confirm the conclusions to which the documents themselves seem to me to lead quite clearly and definitely. This being so, I prefer to base my judgment on those documents, rather than risk obscuring what I regard as a subject not involved in much difficulty, by over-elaboration of collateral detail.

The real difficulty of this case seems to me to lie in its facts. The articles charge Mr. Henly with the following alleged offences:—

Article 3. Non-consumption of a part of the elements consecrated at a celebration in the defendant's church on December 27, 1905 (St. John the Evangelist's Day).

Article 5. A similar failure to obey the rubric on Sunday, January 7, 1906, and on every succeeding Sunday down to and including April 15, 1906 (Easter Day).

Article 4. [The Dean of the Arches read the 4th article as above set out, and continued:—]

Article 6. That on each of the days between January 7, 1906, and April 15, 1906, both inclusive, the said O. P. Henly kept and caused and permitted to be kept in his church the consecrated elements, &c. (following the same words as in the 4th article).

Article 7. That in doing and leaving undone the things mentioned in articles 5 and 6 the defendant disobeyed the express prohibition of the Bishop of Oxford.

The evidence called in support of these charges consists of the correspondence between the Bishop of Oxford and Mr. Henly and the evidence of the Bishop of Reading, who is the suffragan Bishop in the diocese of Oxford. It seems that the Bishop of Reading was present at the church of St. Mary, Wolverton, on December 27, 1905, for the purpose of attending a funeral. The evidence he gave was as follows: "I was going to take part in the funeral service. When I was in the vestry Mr. Henly said, 'I wish you to understand that the blessed sacrament

(1) See Sparrow's Rationale upon the Book of Common Prayer of the Church of England (ed. 1722), p. 223.

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is reserved in the church, and therefore it will be necessary to genuflect before it.' I went straight into the church without waiting for the choir. There I saw the lamp hanging near the altar in front of and above it. Then I went to my place and waited there, and in due time the choir came in, and they made their genuflections quietly and reverently, so much so, that it was certain to me that they had been properly trained."

The Bishop of Reading added that he did not notice any tabernacle. I observe in passing that the articles of charge contain no reference to the genuflections of the choir, practised by them, as the defendant admits in the correspondence, under his direction. The Bishop of Reading made a communication to the Bishop of Oxford, who wrote a letter dated December 31, 1905, to the defendant as follows: "I am sorry to have to write to you on a matter of great anxiety. I have heard from the Bishop of Reading that when he was at Wolverton St. Mary, on the feast of St. John the Evangelist, he saw that the Blessed Sacrament was reserved on or close above the altar, and that a lamp was burning before it, and that the whole choir was evidently trained to genuflect before it. I have to ask you whether the Blessed Sacrament was thus reserved, and if it was so, at what date you began the practice of reservation?"

Mr. Henly replied by a letter dated January 2, 1906, as follows: "In reply to your Lordship's letter, I beg to inform you that the Blessed Sacrament was reserved on or close above the altar at Wolverton St. Mary church on the feast of St. John the Evangelist, that a lamp was burning before it, and the choir was trained to genuflect before it, the only person occupying a position in the choir who on that occasion neglected this act of reverence being the Bishop of Reading himself. The practice of reservation was begun here a year ago last Easter (the Monday after Low Sunday, 1904)."

On January 5, 1906, the Bishop of Oxford wrote to the defendant as follows: "I have to ask you to abandon the practice of reservation and to promise me that so long as you are vicar of Wolverton St. Mary it shall not be re-introduced without the knowledge of the Bishop." On January 11, 1906, Mr. Henly replied: "I beg to state that I do not see my way

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to abandon the practice of reservation, and so cannot give a promise to that effect." On January 20, 1906, the Bishop of Oxford wrote to the defendant, warning him that the matter was, in his Lordship's judgment, so grave that disobedience must entail legal proceedings, and giving the defendant further time for consideration. On January 23, 1906, the defendant replied: "With regard to abandoning the practice of reservation of the blessed sacrament, this is a demand your Lordship has no right to make." Further communications, I gather passed between the Bishop of Oxford and the defendant which did not concern the matter of reservation, and are not before me. I have heard no evidence as to them. On April 7, 1906, the Bishop of Oxford wrote again to the defendant, demanding in formal terms compliance with the rubric which directs consumption of any of the consecrated elements which remain after the communion of the people. On April 21, 1906, the defendant wrote a final letter to the Bishop of Oxford, alleging that he had never disobeyed that rubric, which, in his opinion, did not affect the practice of the reservation of the blessed sacrament for the sick.

This is the whole of the evidence (except certain formal details) on which the Court is asked to deal with the articles of charge. The defendant by his letters admits that he systematically reserves the consecrated elements, keeps them in his church under circumstances which readily admit of external acts of devotion towards them, and trains the children in his choir to genuflect before them. He further absolutely refuses obedience to the reiterated directions of his Bishop in respect of these matters. But with the grave circumstances thus disclosed it is impossible to deal adequately in the present suit, having regard to the articles brought in, and the only evidence by which it is sought to sustain them. With regard to the 3rd and 5th of these articles, there is no evidence as to the defendant's non-compliance with the rubric for the consumption of the consecrated elements at the communion service either on December 27, 1905, or on any of the Sundays between January 7, 1906, and April 15, 1906, inclusive, so that the charges contained in those articles are entirely unproved and Mr. Talbot necessarily abandoned

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them. I am asked to find that Mr. Henly committed the offence charged in the 6th article, namely, retention of the consecrated elements in the church with a light burning before them on each of the days January 7 to April 15, 1906, inclusive. No witness was called who had seen the church and noticed indications such as the Bishop of Reading observed on December 27, 1905, on any one of these days. At the hearing I asked why the churchwardens who are the officers of the Ordinary had not been summoned to give evidence; but the Bishop of Oxford stated in answer to a question from his counsel that he had felt unable under all the circumstances to proffer any evidence except that of the letters. I turn to these, and I find that in the defendant's letter of January 2, 1906, i.e., before the commencement of the period in question, he states: "The practice of reservation was begun here a year ago last Easter." In subsequent letters the defendant declines "to abandon the practice of reservation," denies the right of the Bishop to demand its abandonment, and argues that the rubrics do not "affect the practice." I am asked on these letters, unsupported by any evidence as to what has really occurred at the church, to find that Mr. Henly has on each of certain named days reserved the Sacrament in the manner described. He does not allege in his letters reservation on any one of these days. He asserts prior to January 7, 1906, that it had been his practice to reserve since Easter, 1904, and after January 7, 1906, he asserts his right to continue the practice. But it is perfectly consistent with his letters that during part or even the whole of the period (January 7 to April 15) he for some reason suspended the practice. It is obvious that it is impossible for this Court to find a charge proved, especially a criminal charge, on such evidence. On the other hand, the defendant's general practice of reservation as distinguished from reservation on certain particular dates, although it would appear to be the charge most naturally suggested by the letters, is not pleaded in the articles, and of course cannot be raised in this suit. I take leave to point out that the remarkable position in which the Court finds itself of having to deal with a charge pleaded without any evidence in support of it, while such evidence as there

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is, suggests a charge which is not pleaded, is entirely independent of any peculiarity of procedure in the Ecclesiastical Courts. The same result must follow in any Court if a similar course were taken by the parties. I find that the charge contained in the 6th article has not been proved.

That disposes also of the charge contained in the 7th article, in which the defendant's alleged acts on each of the days between January 7, 1906, and April 15, 1906, inclusive, are charged to have been in disobedience to the Bishop's commands, because, since the commission of these acts has not been proved, it is plain that Mr. Henly cannot be found guilty of contumacy in having done them contrary to the Bishop's commands.

It is also to be noted that the letters do not disclose any directions by the Bishop with reference to any particular days, but an abandonment of the practice which Mr. Henly had in terms admitted is required by the Bishop and refused by the defendant.

There remains the charge contained in the 4th article. The Bishop of Reading's evidence, coupled with Mr. Henly's admissions, establishes that article. It is proved to my satisfaction that on December 27, 1905, the Blessed Sacrament was reserved by the authority of the defendant in Wolverton St. Mary church above the altar, and that a light was burning before it. It is plain from what I have already said that by causing the Sacrament to be so reserved Mr. Henly, in my opinion, committed an ecclesiastical offence. Regarding this offence as I am bound to do by itself, and leaving out of view the other charges, which have not been proved, I think that the proper course for me to pursue is to direct, as I do, that a monition shall issue to Mr. Henly requiring him to abstain from keeping or causing or permitting to be kept in his church, either over the altar or elsewhere, bread and wine which have been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration, and also from keeping burning or causing or permitting to be kept burning a light in front of the said consecrated bread and wine.

I think that the costs of this suit should be borne by the defendant, except so far as they have been increased by the

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charges contained in the 3rd, 5th, 6th, and 7th articles. As Mr. Henly has not appeared in these proceedings, no order as to his costs of these charges will be necessary.

Solicitors for the promoter: *Lee, Bolton & Lee.*

C. F. J.

TOOMER *v.* SOBINSKA.

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Jan. 24.

Probate—Practice—Revocation—"Writing declaring intention to revoke"—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 20—*Form of Grant.*

Where a testatrix duly executed, in accordance with s. 20 of the Wills Act, a paper writing declaring her intention to revoke her existing will, the Court, in pronouncing for the revocation, directed a grant of administration to issue, as upon an intestacy, with a note thereon that the grant was so made in consequence of the execution of the said paper writing, but without annexing the said paper writing to the grant.

THIS was a probate suit, in which the plaintiff, the husband of the deceased, Isabella Hudson Toomer, claimed administration of her estate, as upon an intestacy.

The defendant Violet Carmen Sobinska set up a will of the deceased, under which she was entitled to a life interest in the income of the deceased's residuary estate.

The plaintiff in reply alleged that the will had been revoked by a subsequent paper writing duly executed as a testamentary document in accordance with the 20th section of the Wills Act, 1837. This document was as follows:—

"I, Isabella Hudson Toomer, do hereby declare that the will I have made and which is not in my possession and which consequently I am unable to destroy at this moment, is null and void and it is my intention to express my wishes in a will to be prepared and executed shortly."

May 25, 1905.

I. H. Toomer.

Signed by the above-named Isabella Hudson Toomer as and for revocation of her will in the presence of us both.

(Here followed the signatures of two attesting witnesses.)

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The Court held that the document duly revoked the will. The only part of the case calling for a report was as to the form in which the grant should go.

Priestley, K.C., and *C. J. Mathew*, for the plaintiff. As to the form in which the grant should go, the question is whether there should be simple administration or administration with the paper writing dated May 25, 1905, annexed, as in the somewhat similar case of *In the Goods of Durance.* (1)

W. Addington Willis, for the defendant.

BARGRAVE DEANE J. The grant should go as upon intestacy without annexing the paper writing, but with a note that the grant is so made in consequence of the execution of the document of May 25, 1905, revoking the earlier will.

Solicitors for plaintiff: *Blanckensee & Co.*
Solicitor for defendant: *J. D. B. Lewis.*

H. D. G.

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Nov. 7, 8; *Dec.* 10.

Nullity of Marriage—Bigamy—Different Domicil of Parties to former Marriage—Foreign Decree of Nullity on Ground unknown to English Law —Conflict of Laws—Lex loci contractus.

Restrictions upon and prohibitions against marriage are adjudicated upon according to the lex loci contractus.

No nation is entitled to call upon another nation, within whose territory a marriage has been celebrated, to surrender its own laws in order that effect may be given to a foreign decree annulling such marriage and based upon restrictions and prohibitions unknown to the lex loci contractus.

In the case of a marriage celebrated in England between an Englishwoman domiciled in England and a man domiciled in a country where, in the circumstances, the marriage would be invalid, the proper test of validity is the law of England, at any rate for the purpose of determining in England the status of the parties to the marriage.

A ceremony of marriage according to English form was celebrated in

(1) (1872) L. R. 2 P. & M. 406.

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England between a domiciled Englishwoman and a domiciled Frenchman. The marriage was annulled in France at the suit of the man or of his father, whose consent to the English marriage had not been obtained and was necessary according to the law of the man's domicil.

At a later date the woman married a domiciled Englishman in England:—

Held, that this later marriage was bigamous, and must be annulled at the suit of the man who was a party to it.

Sottomayer v. *De Barros*, (1879) 5 P. D. 94, followed.

HUSBAND'S petition for nullity on the ground of bigamy.

A ceremony of marriage between the petitioner and the respondent was celebrated on October 29, 1904, in England, the respondent describing herself as a widow. Six years before, the respondent had been married, also in England, to Leon Philip, a domiciled Frenchman, who was at the time temporarily residing in England for commercial purposes. The ages of the parties to this marriage were at the time of the marriage stated as being twenty-five and twenty-two respectively, but it turned out that the age of the man was in fact nineteen, and shortly afterwards his father, who had not known of the marriage, came to England and removed his son to France. The respondent, by her answer, set up—(1.) that her first marriage with Leon Philip, a domiciled Frenchman, was invalid; (2.) that it had been declared invalid by a tribunal of Philip's domicil, viz., by the Civil Tribunal of the Seine, in France; and (3.) that the judgment of the French tribunal had been declared in this Court on July 5, 1904, to be a valid and effectual decree.

The petitioner, in his reply, traversed the alleged French domicil of Leon Philip, and denied the jurisdiction of the French Court to annul the first marriage of the respondent; and he further denied that the validity of that decree had been pronounced for in this Court. The marriage of Philip and the respondent had, in fact, been declared invalid by the French tribunal, and it was established to the satisfaction of the Court that Philip was still living at the date of the present proceedings, and had remained in France. There had been previous proceedings in this Court as hereinafter mentioned:—

On July 21, 1903, the present respondent had filed a petition in this Court alleging herself to be the lawful wife of Philip, and

that he had been guilty of desertion and adultery, and praying for dissolution of her marriage with him. No ground was suggested in that petition for invalidating the marriage with Philip, but the prayer of it asked for, in the alternative, a declaration "that the said marriage is already annulled." No formal sentence of nullity in this Court was, however, prayed for. That petition was undefended, and came on for hearing on July 4 and 5, 1904; and, as appeared from the order, as drawn up, it was dismissed on the ground of "want of jurisdiction," the Court being satisfied that the parties were domiciled in France.

From a shorthand note of the proceedings at the hearing of that petition it appeared that the late President (Sir F. H. Jeune), before whom it was tried, expressed himself, in the course of the hearing, to the effect that he would assume that the decree of the French Court, which was before him, was right (according to French law), but he declined to make any decree to that effect upon that petition.

Evidence of French law was now given by a member of the French Bar (M. de Lataulade), and articles 148 and 170, among others, of the French Civil Code were referred to.

Article 148 is as follows: "The son who has not attained the full age of twenty-five years, the daughter who has not attained the full age of twenty-one years, cannot contract marriage without the consent of their father and mother; in case of disagreement, the consent of the father is sufficient."

Article 170 is as follows: "A marriage contracted in a foreign country between a native of France (1) and a foreigner shall be valid if celebrated according to the forms used in that country, provided that it has been preceded by the publications prescribed in article 63, under the title of 'Acts of the civil power,' and that the Frenchman has not infringed the regulations contained in the preceding chapter."

The witness stated that the object of the publications prescribed in article 63 was to enable the parents of the husband to object, and that the effect of the French decree in the present case was to annul the marriage on the ground of want of consent of the

(1) The original text is: "Le mariage contracté en pays étranger entre Français, et entre Français et étrangers, sera valable," &c.

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father of Philip, who was under the prescribed age at the time of his marriage with the respondent.

Such further facts of the case as are material are stated in the judgment.

R. M. Middleton, for the petitioner. The validity of the first marriage of the respondent depends upon the lex loci contractus, viz., England. The consent by the parents of Philip was merely a part of the ceremony: *Sottomayor* v. *De Barros* (1); and regard will not be had to the opinion of a foreign Court on an English marriage ceremony: *Sinclair* v. *Sinclair*. (2) The question here is substantially whether the law of the domicil of the husband shall prevail or the law of the place where the contract was made. There is a chain of authority that the latter is to prevail: *Scrimshire* v. *Scrimshire* (3); *Brook* v. *Brook* (4); *Simonin* v. *Mallac* (5); *Sottomayer* v. *De Barros*. (6)

[He also referred to Dicey, Conflict of Laws, 1896, pp. 223 and 626; Story, Conflict of Laws, ed. 1883, s. 90; *Hay* v. *Northcote*. (7)]

Bayford, for the respondent. The question is one of status, and must be decided by the law of the domicil of the parties to the contract. *Simonin* v. *Mallac* (5) is the foundation of the argument against the respondent, but that case is no longer an authority, having regard to the trend of modern decisions. The respondent, by marrying Philip, acquired a French domicil; and this Court will recognize the effect upon her status of the decision of the Court of that domicil, though given on grounds which would not apply here: *Bater* v. *Bater* (*otherwise Lowe*) (8); *Dalrymple* v. *Dalrymple* (9); *Brook* v. *Brook* (4): *Sottomayer* v. *De Barros* (6); *Harvey* v. *Farnie* (10); *Warrender* v. *Warrender*. (11) This Court cannot go behind the decision of the French Court: *Pemberton* v. *Hughes* (12); *Doglioni* v. *Crispin* (13);

(1) (1877) 3 P. D. 1, at p. 7.
(2) (1798) 1 Hagg. Cons. 294.
(3) (1752) 2 Hagg. Cons. 395, at p. 407.
(4) (1861) 9 H. L. 193.
(5) (1860) 2 Sw. & Tr. 67.
(6) 5 P. D. 94. In other reported cases between the same parties, 2 P. D. 81, 3 P. D. 1, the petitioner's name is given as *Sottomayor*, and *qu.* whether not correctly.—F. P.
(7) [1900] 2 Ch. 262.
(8) [1906] P. 209.
(9) (1811) 2 Hagg. Cons. 54.
(10) (1882) 8 App. Cas. 43.
(11) (1835) 2 Cl. & F. 488.
(12) [1899] 1 Ch. 781.
(13) (1866) L. R. 1 H. L. 301.

Castrique v. *Imrie*. (1) The distinction between suits for nullity and suits for dissolution is a mere technicality.

R. M. Middleton, in reply. The matrimonial cases relied upon on the other side are distinguishable. In none of them was the validity of the marriage disputed. Those cases merely shew that this Court recognizes the authority of a foreign tribunal to dissolve an English marriage for some cause which has accrued since the marriage, when also the domicil of the parties has been changed since the date of the marriage.

1906. Dec. 10. BARGRAVE DEANE J. stated the foregoing facts and said: This was a suit by the petitioner, William Henry Ogden, for a decree of nullity of marriage on the ground that the respondent, at the time he went through the form of marriage with her, was a married woman with a husband still alive, and that the respondent's former marriage was undissolved. The respondent, in her answer, alleged that she was not lawfully married to her former husband, and she says that the French Courts had already decreed that that marriage was null and void, and she further alleges that in the former suit in this Court the late President (Sir Francis Jeune) declared that French decree to be a valid and effectual decree.

These matters are denied by the petitioner in his reply, and the question I have to decide is whether or not Mr. Ogden, the petitioner in this case, is entitled to a decree of nullity. The history of the case is this: The respondent, whose maiden name was Williams, went through the ceremony of marriage with Leon Philip, a Frenchman, on September 14, 1898, at Prestwich, in England. Leon Philip was a Frenchman both by birth and by domicil. He had come over to this country temporarily, as the present respondent said in the witness-box, to learn English commerce and also to acquire a knowledge of the English language. He proposed to her, and they were married without the knowledge of her father or of his father. The marriage certificate states her age to have been twenty-five and his to have been twenty-two. As a matter of fact, it turns out that his age was nineteen. After the marriage the parties

(1) (1870) L. R. 4 H. L. 414.

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cohabited in England for a short time, and then the marriage became known to her father, who communicated at once with Leon Philip's father in France, and the result was that Leon Philip's father came over to this country and took away his son to France, and he has ever since remained in France. The result of that marriage was that the wife became pregnant, and a child was subsequently born. In the year 1900, I think, the father of Leon Philip instituted proceedings in the French Courts for a decree of nullity, on the ground that his son, at the time of the marriage, was under the age (twenty-five, according to the French Code) at which he could lawfully marry without the consent of his parents, and the consent of the parents had not been given; and further, the father refused to do what he might have done to legitimize the marriage, namely, by giving his consent afterwards. The result was that the French Court declared the marriage null on the ground I have stated. The wife at that time appealed to the French Court that Leon Philip should allow maintenance for the child, and an order was made accordingly. The lady does not seem to have gone to France at all; but later on she took what I think will turn out to be a mistaken proceeding.

She heard that after the decree in France Leon Philip married again in France; and she thereupon took proceedings in this Court, not for a decree of nullity of marriage, which I think she should have done, to decide whether it was a good marriage or not, but she took proceedings for divorce against Leon Philip, on the ground that he had deserted her and had been guilty of bigamy and adultery. That was the case which came before Sir Francis Jeune, and which is referred to in the pleadings here. I have a transcript of the shorthand note of part of what took place before Sir Francis Jeune. Mr. Ellis Griffiths, who appeared for the wife on that occasion—the husband not putting in any answer to that suit and not appearing—asked two things. He said, Give me a decree of divorce, or, if you cannot give me a decree of divorce, then make an order that the French decree is a valid and effective decree. I have already said that what I think ought to have been asked for by the wife was a decree of nullity; but she did not ask for a decree of nullity, she only asked

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the Court to declare that the French decree was a good and valid decree.

Sir Francis Jeune declined to make an order in support of that prayer on either point. He said, with regard to the question of divorce: "You are here appearing in the capacity of the lawful wife of a Frenchman. If you are his lawful wife his domicil, which is undoubtedly in France, is your domicil, because the wife acquires the domicil of her husband on marriage; and therefore, if you appear here as his wife, you must have a French domicil, because you are the wife of a Frenchman; therefore I cannot give you a divorce. On the other question, I am not asked to give any decree of nullity of marriage, but you only ask me to say that the French decree is operative"; and the late President added: "I am not going to make any such order. If a French decree is a good decree according to French law, it is prima facie a good decree; and I assume that the French Court was justified, in accordance with its own procedure and its own laws, in making that decree, and I am not going to disturb that decree; but you do not ask me to deal with it upon the point of English law; therefore, I make no order."

The judgment was drawn up in the ordinary form, dismissing the petition on the ground of want of jurisdiction—that is, on the question of divorce—both the parties being domiciled French people, and this Court having, therefore, no jurisdiction to dissolve the marriage.

Now, the wife having failed to obtain that decree from Sir Francis Jeune, later on, on October 29, 1904, married Mr. Ogden, the present petitioner, in Lancashire, according to English rites, and she lived with him for a time, and became pregnant and had a child by him. Later on Mr. Ogden ascertained the true facts of this case. I may mention that she described herself as a widow when she married Mr. Ogden, and, although she says she told him the whole of the facts, he disputes that assertion. Mr. Ogden, having found out these facts, brings this suit to have it declared that his marriage with the respondent is bad, on the ground that, according to English law, she is still the lawful wife of Leon Philip. The parties both gave evidence

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before me, and it is clearly established to my satisfaction that, at the time of the marriage to Mr. Ogden, Leon Philip was alive —in fact, he is still alive. The result is that I have now to deal with the case of a woman who was English by domicil and a domiciled Frenchman who were married in this country. Cases have been cited to me on behalf of the wife (who wishes, of course, to press that the English marriage with Mr. Philip should be declared null and void so that her marriage to Mr. Ogden would be a good one) to the effect that, by law, her marriage with Philip was bad; and cases have been quoted, to the effect that I am bound to take cognizance of the French decree. There are two points raised—first of all, that it was a bad marriage; and secondly, that if it was a good marriage, there is a French decree of which this Court is bound to take cognizance.

With regard to the first point, I am of opinion that that was a perfectly good marriage between her and Leon Philip. Upon that point cases were quoted on both sides.

The first case was *Simonin* v. *Mallac*. (1) That was decided by Sir Cresswell Cresswell, Baron Channell, and Keating J., sitting as the Full Court of Divorce in the earlier days in this Court, when no decree could be pronounced except by the Full Court. That was a case in which two French people, knowing they could not get married in France because they could not get the consent of the parents, came over to this country and got married. Subsequently the husband left his wife (I think they both returned to France), and he brought a suit in France for a decree of nullity and was successful. The wife then wanted to be sure of her position, and she brought a suit in this country for nullity of marriage, on the ground that, the marriage being celebrated in this country, this was the proper Court to deal with it. The Full Court decided that where there was a marriage celebrated in this country, the lex loci contractus was the proper law, and the Court in whose jurisdiction the marriage was entered into—was the proper Court to decide upon the validity of that contract, and the Court decided that the question of the consent of parents had nothing whatever to do with the contract, which

(1) 2 Sw. & Tr. 67.

was only a sort of provisional necessary precedent which the English law does not recognize. Accordingly the Full Court decided that it was a perfectly good marriage, took no notice whatever of the French decree, and refused to grant a decree of nullity of marriage. That decision remained untouched until the case of *Sottomayor* v. *De Barros* (1) in this Court. That case was discussed three times: first of all it came before Sir Robert Phillimore as an undefended case, and then it came before him a second time, because, being undefended, he thought it was necessary that he should hear it argued, and at his request the Queen's Proctor (as he was then) intervened for the purpose of arguing the case on the other side. The result was that Sir Robert Phillimore held that that case disclosed a good marriage. There was an appeal from Sir Robert Phillimore's decision, and the Court of Appeal reversed the decision of Sir Robert Phillimore and said the marriage was not good. Later the case came before this Court again. Sir James Hannen then tried it.

Now, for the purpose of explaining my judgment, I must just refer to the facts of that case a little.

It was the case of Portuguese subjects who were first cousins, and who had married in England. They were Roman Catholics. By Portuguese law, first cousins may not marry, and such a marriage would be considered incestuous; but they might marry on either episcopal or papal dispensation, and, in that case, there would be no incest in the marriage. Knowing they could not get married in their own country, they came to England; and later on, after being in England for some time, they were married. When the case came before Sir Robert Phillimore the facts were not gone into very fully.

It was accepted that they were both domiciled Portuguese subjects, and Sir Robert Phillimore, not considering that part of the case very particularly, referred to the decision in *Simonin* v. *Mallac* (2), and said, following the case, that, being an English marriage, it was a good marriage by English law, because the disqualification was not a disqualification recognized by English law—first cousins, by English law, as everybody knows, being

(1) 3 P. D. 1. (2) 2 Sw. & Tr. 67.

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allowed to marry. The Court of Appeal said in effect: "No; these two people being Portuguese, they have, by the law of their own country, an absolute incapacity to marry; therefore, being both Portuguese subjects, they carried with them the disqualification of the law of their own country; and we decide that they could not marry, and their marriage in this country is bad." Then the Court of Appeal carefully said—I had better read the passage from the judgment of the Lords Justices (1): "It only remains to consider the case of *Simonin* v. *Mallac*. (2) The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* (2) does not, we think, govern the present case."

Therefore they took care to say that, deciding as they did in the case of *Sottomayer* v. *De Barros* (3) that the disqualification to marry was inherent in the parties, it must be distinguished from the case of mere want of consent of parents, which was not a matter of the capacity to marry, but a matter in connection with the ceremony, and therefore they said that that case did not apply.

Then the case came back to this Court, and the facts were fully gone into before Sir James Hannen (3): I must go into this a little more in detail, because it explains very clearly what the law is on these questions of conflict of law of marriage and shews to a great extent what is the distinction to be drawn between the facts in the various cases.

After considering the earlier part of the case Sir James Hannen says (4): "the sixth issue is the important one on which the arguments have chiefly turned, namely, whether or not the petitioner and the respondent were, or either of them was, at the time of the marriage domiciled in England. With regard to the petitioner, as she was a minor at the time of the marriage,

(1) 3 P. D. 1, at p. 7.
(2) 2 Sw. & Tr. 67.
(3) 5 P. D. 94.
(4) Ibid. at p. 98.

her domicil was that of her father"; and he held the father's domicil was Portuguese, and therefore that her domicil at the time of the marriage was Portuguese. Sir James Hannen continued: "With regard to the respondent, he was also a minor, and his domicil was therefore the same as his father's"; and then the learned President went on to deal with the history of the father of the respondent—how he had come to England some years before, had been here and carried on business here and had acquired an English domicil, and that the son, a minor at the time of the marriage, had an English domicil. Therefore you had there a wife who was Portuguese by domicil, and a husband, who was English by domicil, entering into marriage in this country; and that is very like the present case. Here you have a woman who had an English domicil and a man who has a French domicil. Then the judgment proceeds (1): "The question then arises, What is the law applicable to such a case? It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit. 'It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicil of the latter. Our opinion in this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage.' "

Then (2) Sir James Hannen says: "But, as I have already pointed out, that judgment expressly leaves altogether untouched the case of the marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where the marriage is prohibited." I have already pointed out that the basis of the Court of Appeal's judgment was that both parties were Portuguese.

Then Sir James Hannen, referring to all the arguments which had been urged in support of the larger proposition, that a marriage good by the law of the country where solemnized must

(1) 5 P. D. 94, at p. 99. (2) Ibid. at p. 101.

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be deemed by the tribunals of that country to be valid, irrespective of the law of the domicil of the parties, says (1): "They cannot, I think, be stated with greater accuracy and force than by Sir Cresswell Cresswell in *Simonin* v. *Mallac* (2), and as I certainly could not express myself so well, I shall adopt the language of that learned judge as my own without introducing the qualification which the decision of the Court of Appeal has created. But before quoting the language of that very eminent judge, I must observe that the Court of Appeal has distinguished the present case from that of *Simonin* v. *Mallac* (2), on the ground that there the incapacity arose from the want of consent of parents, and that the 'consent of parents required by the law of France must be considered a part of the ceremony of marriage.' Certainly Sir C. Cresswell did not base his judgment on that ground. After observing that a distinction might be drawn between an absolute and a conditional prohibition, he proceeds: 'But taking the decree of the French Court in the suit there instituted as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such a rule does not extend to contracts of marriage, and that parties are with reference to them bound by the law of their domicil.' Then, after reviewing the authorities, he says: 'It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the Courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country, should hold it void because the parties to the contract were the domiciled subjects of another country where such a contract would not be allowed.' And later on the following passage occurs, which is especially applicable to the present case: 'Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage

(1) 5 P. D. at p. 102. (2) 2 Sw. & Tr. 67.

contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame. But what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations—that law to which all nations have consented, or to which they must be presumed to consent for the common benefit and advantage, and which would be for the common benefit and advantage in such a case as the present? The observances of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know or to take the responsibility of not knowing the law of that country. Now the law of France [in this case read Portugal] is equally stringent whether both parties are French or one only. Assume, then, that a French subject comes to England—' this is very remarkable; it is a judgment long antecedent to the case of Mr. Ogden, the present petitioner, and yet it seems almost like a judgment in this case. 'Assume, then, that a French subject comes to England and here marries without consent a subject of any foreign country, by the laws of which such a marriage would be valid; which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed; would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law?' 'The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall, in that country at least, decide whether it is valid or invalid, the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of

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authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.' "

Then the learned judge adds: "This was the opinion of Sir C. Cresswell, Channell B. and Keating J., constituting the Full Court, whose decisions at that time were only subject to review by the House of Lords. The Court of Appeal has, indeed, without alluding to the arguments of these very eminent judges, now overruled their opinion to some extent. But Cotton L.J. has expressed his concurrence in their views, so far as is necessary for the purposes of the present case. He says: 'No country is bound to recognize the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country' "; and then Sir James Hannen says, looking at this matter from the point of view he has expressed in the judgment he has so given, he finds that that marriage must be held to be a good marriage, on the ground that one of the parties to it was a domiciled Englishman, and that therefore the marriage having been celebrated in England the law of England prevails over the other foreign country.

Now that is to my mind exactly the point, and I approve of that decision. But, whether I approve of it or not, I am certainly bound by it; and therefore there can be no doubt that my judgment in this case must be that, inasmuch as the marriage between the respondent and Leon Philip was a marriage in this country between a domiciled Englishwoman and a domiciled Frenchman, the English law must prevail, and by the English law this was a valid marriage. Therefore the respondent in the present suit is still, by English law, the wife of Leon Philip, and, consequently, she was not capable of contracting marriage with Mr. Ogden, and therefore this petitioner's marriage must be declared null and void on the ground that the respondent had a husband living at the time of her marriage with him.

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Mr. Ogden's petition therefore succeeds. The result is brought about entirely by the respondent's own act. Behind the back of everybody who could advise her, and without her father's knowledge or consent, she contracted marriage with a Frenchman without asking any question; and, further than that, I think it was through her own mistake subsequently that she finds herself in this position. If instead of bringing a suit before Sir Francis Jeune for divorce, in which she accepted the marriage as valid, she had brought a suit for nullity, she probably would have succeeded in having her position defined; for, although she would not have succeeded in getting a decree of nullity, she would have succeeded in getting a decree in this Court that she was lawfully married to Leon Philip. I cannot make any order as to the wife's costs, as I think that she, by her own act, caused the trouble which has arisen.

Solicitors for petitioner: *Chester, Broome & Griffiths, for Crofton, Craven & Worthington, Manchester.*

Solicitor for respondent: *F. Evelyn Jones.*

H. D. G.

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Feb. 8, 11.

SPIERS *v.* ENGLISH.

Probate—Practice—Costs.

The two main principles which should guide the Court in determining that costs in a probate suit are not to follow the event are, firstly, where the testator or those interested in the residue have been the cause of the litigation; and, secondly, if the circumstances lead reasonably to an investigation in regard to a propounded document. In this latter case the costs may be left to be borne by those who incurred them; in the former, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate.

Neither of those principles, which, however, are not exhaustive, justifies a plea of undue influence unless there were reasonable grounds for putting it forward.

Wilson v. *Bassil*, [1903] P. 239, commented on.

PROBATE ACTION.

The plaintiff, as a lawful nephew and one of the next of kin of Charlotte Spiers, deceased, claimed revocation of probate obtained by the defendant of a will of the deceased dated January 25, 1905.

The plaintiff alleged that the said will was not duly executed, that the deceased did not know and approve of the contents thereof, and that the purported execution thereof was obtained by the undue influence of the defendant.

The defendant set up the will and asked for probate thereof in solemn form of law.

The jury found for the defendant on all the issues, and the Court pronounced for the will.

Barnard, K.C., and *Bayford*, for the plaintiff, asked for costs out of the estate, or, alternatively, that the Court should direct that each party should pay his own costs. They cited *Orton* v. *Smith* (1); *Wilson* v. *Bassil*. (2)

Willock, for the defendant, contra.

Cur. adv. vult.

Feb. 11. SIR GORELL BARNES, PRESIDENT. The ground on which the plaintiff based his application that costs should be

(1) (1873) L. R. 3 P. & M. 23. (2) [1903] P. 239.

paid out of the estate was that the defendant, being the person who obtained the will and was mainly interested under it, had to discharge the onus of proof, which rested with special heaviness upon him, that therefore it did not make any substantial difference that the plaintiff had made a charge of undue influence against him, and that this plea was in fact necessary in order to bring out all the facts in regard to the plea of want of knowledge and approval of the contents of the will. In support of that contention counsel for the plaintiff cited *Orton* v. *Smith* (1) and *Wilson* v. *Bassil.* (2) In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation.

Now this was certainly a very peculiar case. The testatrix was a pauper in the eyes of the world, but, in fact, was found after her death to have had some 1200*l.* or 1300*l.* stowed away in two banks.

The defendant, in his capacity of relieving officer, came to be acquainted with her, and he made the will in question in circumstances which, according to the case presented by him before the jury, shewed that he did not know that she had anything substantially to dispose of. The relatives of the testatrix, finding out after her death that she had this considerable sum of money, were naturally anxious to get rid of the will.

The defendant, being a public officer, was fighting not only for

(1) L. R. 3 P. & M. 23. (2) [1903] P. 239.

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the money left to him by the will, but for his reputation, for it is obvious that it would have been a serious matter for him to have been found guilty of the charge of undue influence.

One of the points to which I directed the special attention of the jury was whether they thought the defendant knew or expected, at the time he made the will, that the testatrix possessed a considerable sum of money, because in my view that would have rendered his position very different from what he said it was, namely, that he imagined when she asked him to make the will that she only had some few pounds to pay for her burial.

I am not sure that I quite agree with the views of the learned judge who tried the case of *Wilson* v. *Bassil* (1) when he said that there was a presumption against the will. I do not think that is quite the right way to put it. If the learned judge meant to say more than that the onus was especially heavy upon a person who obtains and puts forward for probate a will in his own favour, I do not agree with him. I doubt whether the fact of his having been instrumental in making a will under which he substantially benefits makes any difference in the presumption of law. The question always is whether a person propounding a will has made out a case in favour of the document. And in my view a plea of undue influence ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it.

Passing from those general observations, there is this to be noted in the present case. The whole case really turned upon the position of the defendant, who was cross-examined by Mr. Barnard with a view to shew anything that would support the pleas of undue influence and want of knowledge and approval; and when that witness left the box without having been touched in cross-examination the case was to my mind practically at an end. If any ground had been shewn for attacking the defendant's character, then there might have been a reasonable prospect of successfully attacking the will.

Reviewing the facts of the case as disclosed in evidence, I do not think that the plaintiff has shewn any ground on which I ought to order that the costs of the plaintiff should be paid out of

(1) [1903] P. 239.

the estate, or to interfere with the ordinary rule that costs follow the event. 1907

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Solicitors for plaintiff: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for defendant: *Rawle, Johnstone & Co., for Downie & Gadban, Alton.*

H. D. G.

IN THE ESTATE OF ANN FAITH BRYAN, DECEASED. 1907

Feb. 18, 25.

Probate—Revocation—Inconsistent Wills—Intention—Implication.

A later will may revoke earlier testamentary documents, although the earlier documents may have disposed of the whole estate of the deceased, and although the last document contain no express clause of revocation and leave the residue undisposed of.

The intention of the testator or testatrix is to be gathered from a consideration of the substance, and not merely the form of the testamentary documents.

If the intention remain in doubt upon the face of the documents themselves, extrinsic evidence of the surrounding circumstances may be admitted to place the Court, as far as may be, in the position of the testator or testatrix at the time when the last document was executed.

PROBATE MOTION.

The testatrix, Ann Faith Bryan, died in November, 1867, and probate of her last will, dated October 20, 1867, was granted in due course to the executors therein named, the estate being sworn under 4000*l.*

The question was at that time raised as to whether the last will should be admitted alone; but, as the same person was tenant for life in any event, it was arranged that no proceedings should be taken till after the death of the tenant for life.

One of the executors died in 1884 and the other in 1887. On the death of the last executor of the surviving executor in January, 1905, intestate, the chain of representation was broken.

On November 18, 1906, the sister of the testatrix, who took a life interest under the said last will, died, and the question then arose as to the destination of the residuary estate which was undisposed of by that will.

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By an earlier will executed in 1864, with a codicil thereto executed in 1865, the deceased had left all her property to two persons (the same two as she subsequently named as executors under her last will), subject to the payment of debts and funeral and testamentary expenses and of certain specific legacies, in trust for her sister Ellen Amelia Bryan for her life, and, after the sister's death, for her niece Catherine Mary Orton for her life, and thereafter for the children of her said niece.

The last will was in substance a repetition of the former will and codicil, but the trusts in favour of the niece and the niece's children were omitted and a specific legacy to the niece was cut down, while a legacy to another member of the Orton family was omitted. A legacy of 500*l.* to a person not previously named was included in the last will, but there was no express clause of revocation and no gift of residue.

Since the chain of representation was broken trustees had been in due course appointed. None of the legacies had been paid, and it was stated that if all the documents were pronounced for and if the legacies were cumulative they would amount to more than the present value of the estate, which was stated to be 2368*l.* only.

The next of kin of the testatrix had predeceased her sister, the tenant for life under both wills.

The trustees now applied, on motion, notice of which had been served on all parties interested, to revoke the existing grant of probate, and for a grant, under s. 73, to themselves of administration with all three testamentary papers annexed as together constituting the true last will of the testatrix.

Bayford, for the trustees, cited *In the Goods of Cosnahan* (1); *In the Goods of Stewart.* (2)

Barnard, K.C., and *Kingsbury*, for the niece, Mrs. Orton, the residuary legatee under the earlier will, and also for her children. As the last will does not dispose of the whole property, and as it contains no clause revoking earlier testamentary dispositions, no intention to revoke can be inferred from the last will. Evidence of intention is not admissible. Such evidence could only be

(1) (1866) L. R. 1 P. & M. 183. (2) (1875) L. R. 3 P. & M. 244.

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admitted if there were a doubt on the face of the documents themselves. Here the documents are perfectly clear. Evidence cannot be given to add to their meaning. If there is any doubt, the proper course for this Court is to admit all the documents and leave the matter to be dealt with, if necessary, by a Court of construction. [They referred to *Gould* v. *Lakes* (1); Theobald on Wills, p. 43.]

Priestley, K.C., and *J. M. Stone*, for persons entitled in distribution in case of intestacy. If this question had been raised and pressed at the time of the death, evidence which is now lost would have been available. The documents themselves shew clearly that the last will was intended to be substituted for those which had preceded it. But if extrinsic evidence is admissible, as it is submitted it is, in case the Court is not satisfied as to the intention of the testatrix from a perusal of the documents themselves, an affidavit which has been made by one of the trustees, who is the successor in business of one of the original executors, is now tendered. [The affidavit was allowed to be put in and read quantum valeat.] Extrinsic evidence is admissible for the purpose of shewing what are the constituent parts of the testamentary dispositions: *Gould* v. *Lakes*. (1) [They also referred to *Dempsey* v. *Lawson* (2); *Chichester* v. *Quatrefages* (3); *Methuen* v. *Methuen* (4); *Lemage* v. *Goodban*. (5)]

Cur. adv. vult.

Feb. 25. SIR GORELL BARNES, PRESIDENT. The question turns upon whether a will dated 1864, with a codicil thereto, and a will dated 1867 shall be admitted to probate as together constituting the true last will of the deceased, or whether the will of 1867, which has already been proved in common form, shall alone be admitted to probate.

It is contended, on the one hand, that as the earlier will and codicil dispose of the whole property of the deceased, and as the later will contains no clause of revocation and does not dispose of the residue, the last document cannot be held to work a revocation of the earlier documents. On the other hand, it is

(1) (1880) 6 P. D. 1.
(2) (1877) 2 P. D. 98.
(3) [1895] P. 186.
(4) (1817) 2 Phillim. 416.
(5) (1865) L. R. 1 P. & M. 57.

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contended that the last document is so inconsistent with the others that they cannot stand together; and, further, that if this is not plain from the documents themselves, extrinsic evidence is admissible to shew the intentions of the testatrix.

In my opinion revocation may be implied from the terms of the last document, even though it contain no express clause of revocation and the whole estate of the deceased be not thereby disposed of.

Before referring to the decided authorities, it is desirable that I should refer to certain features in the documents themselves. The second will is a copy of the first, except where indicated in the red ink alterations in the draft. The will of 1867 is expressed to be the "last will," and, although this is by no means conclusive, it is a circumstance which cannot be overlooked.

The first gives all the property to trustees upon trusts specified; the second provides that the trustees are to hold the property dealt with thereby upon trust as therein mentioned.

In each case there is a provision that the property is given to the trustees subject to the payment of debts and funeral and testamentary expenses. It cannot have been the intention of the testatrix that the trustees were to pay the debts and funeral and testamentary expenses twice over; and, therefore, it is quite clear that, so far as those provisions are concerned, they were meant to be in substitution and not in addition to the like provisions in the earlier will. The legacies are, with one or two variations, the same in both wills, but it is important to note that under the later will they are to be payable at a different time to that mentioned in the earlier will. The executors are the same. So that it would appear that, apart from the question of omitting the final residuary bequest, the later will was intended to be in substitution for the earlier one. The testatrix cannot in my opinion have intended the legacies to be cumulative, for if so treated they would, as I am informed, amount to more than the total value of the estate. Three cases cited in Theobald on Wills, 6th ed. (1905), p. 158, have a bearing on this question. They are *Jackson* v. *Jackson* (1); *Kidd* v. *North* (2); *Tuckey* v. *Henderson*. (3)

(1) (1788) 2 Cox, 35.

(2) (1845) 14 Sim. 463; (1846) 2 Ph. 91.

(3) (1863) 33 Beav. 174.

If this question were dealt with by a Court of construction, I do not think that the second lot of legacies would be treated in this case as cumulative on the first. Moreover, the matter is somewhat different where the Court dealing with it is the Probate Court and not a Court of construction dealing simply with two or more admitted instruments.

Then, coming to decided cases, *Dempsey* v. *Lawson* (1) is an authority for saying that the fact that a later will does not dispose of the whole property of the deceased, and contains no express clause of revocation, will not necessarily prevent it from being treated as revocatory of an earlier document which did dispose of the whole property. Sir James Hannen said (2): "In support of this contention, Williams on Executors, 6th ed. p. 150 (3), and the cases there cited, were relied on. I assent to the principle expressed in the passage referred to, and I have had occasion to act upon it in the case of *In the Goods of Petchell* (4), but it becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the Court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it is used; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This was decided by Sir Herbert Jenner Fust in *Plenty* v. *West*." (5)

The decision in *Gould* v. *Lakes* (6) does not touch anything of importance in the present case.

(1) (1877) 2 P. D. 98.
(2) 2 P. D. at p. 105.
(3) 10th ed. p. 120.
(4) (1874) L. R. 3 P. & M. 153.
(5) (1845) 1 Roberts. Eccl. 264.
(6) 6 P. D. 1.

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In *Lemage* v. *Goodban* (1) it was perfectly obvious from the consideration of the testamentary papers themselves that the testator intended all his property to go to his sister. Another case cited was *Chichester* v. *Quatrefages*. (2) [The learned President read the judgment from the report of that case.]

In regard to the further proposition contended for by Mr. Priestley and Mr. Stone that, if a perusal of the documents themselves does not satisfy the Court, external evidence may be looked at, I doubt whether this means anything more than that the Court may put itself in the same position as the deceased was in when she sat down to sign the last will—in other words, to enable the Court to ascertain what the deceased knew at that time. In the case of *Jenner* v. *Ffinch* (3) I doubt whether the Court looked at anything more than was needed to put it in possession of the facts known to the testator at the time the will in question was signed.

Sir James Hannen there said (4): "In *Dempsey* v. *Lawson* (5) I relied solely on the contents of the second instrument, taken in connection with the earlier one, and with the facts with reference to which the second was made, and which might, therefore, afford a guide to the testatrix's meaning. In the present case, although I think that the will of February 2, 1879, does contain some internal evidence of the intentions of the testatrix that it should be in substitution of the first, I think it desirable, if I can properly do so, to have recourse to external evidence to shew whether or not the testatrix intended the last instrument to constitute her sole will, and so by implication to revoke the first. This makes it necessary that I should consider the question which I advisedly left undetermined in *Dempsey* v. *Lawson* (5), whether such external evidence is admissible, and under what circumstances. By the Wills Act (1 Vict. c. 26, s. 20) it is enacted that 'no will or codicil or any part thereof shall be revoked otherwise than aforesaid (i.e., by marriage) or by another will or codicil executed in manner hereinbefore required.' This leaves untouched the question what will being duly executed will

(1) L. R. 1 P. & M. 57.
(2) [1895] P. 186.
(3) (1879) 5 P. D. 106.
(4) 5 P. D. at p. 110.
(5) 2 P. D. 98.

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revoke an earlier one. I think it clear that no express words of revocation are necessary. The authorities appear now to establish that revocation by implication is sufficient. On this point I refer to what I said in *Dempsey* v. *Lawson*." (1)

Summed up in the report of *Jenner* v. *Ffinch* (2), it is thus stated: "The question what instruments are to be admitted to probate, as together or separately constituting the testator's last will, is solely for the Court of Probate, as it was formerly for the Ecclesiastical Court. In considering this question the Prerogative Court did in some circumstances admit parol evidence with respect to the factum of the instrument, in order to investigate quo animo the act was done by the testator. The subject was very fully discussed by Sir H. Jenner in *Thorne* v. *Rooke* (3), and he came to the conclusion that where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions. In the case before him the learned judge thought there was no such doubt or ambiguity, but the cases of *Methuen* v. *Methuen* (4), commented on and not disapproved of by Sir H. Jenner, may be referred to as shewing what doubt arising on the face of the instrument, and taken in connection with the facts known to the testator, will be sufficient to justify the admission of external evidence. There the testator, having made one codicil, under which his wife and daughters took certain benefits, after the marriage of one of the daughters made a codicil in which, after reciting that he had made a provision for this daughter, proceeded to make dispositions in favour of the wife and daughters differing from those in the first codicil. There was nothing making it absolutely impossible that the testator meant their disposition to be cumulative, but, as Sir H. Jenner points out, it did appear that if both the codicils had been acted upon 'the property of the deceased would not have been equal to the payment of all the legacies that had been given.' It was upon this state of facts that Sir J. Nicholl said:—'The first instrument remains

(1) 2 P. D. 98.
(2) 5 P. D. 106, at p. 111.
(3) (1841) 2 Curt. 799.
(4) 2 Phillim. 416.

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uncancelled and there are no revocatory words in the second. It is contended that the Court has no power to inquire further, but the same rules do not apply in a case relating to the factum of the will which would apply if the inquiry were concerning the construction of it. In the Court of Probate the whole question is one of intention. The animus testandi and the animus revocandi are completely open to investigation in this Court. It is admitted that if there is doubt on the face of the instrument the Court may admit parol evidence.'"

That is an authority for the proposition that in cases of doubt external evidence is admissible. In the present case it is not necessary to refer to any such evidence. I am of opinion that on the face of these documents themselves the last will is a revocation of the earlier documents. But if that were not so, and if this case fell within the decision in *Jenner* v. *Finch* (1), it is made absolutely clear beyond all doubt that the testatrix intended the last will alone to operate. The effect is that there is an intestacy as to the residue. It would be strange indeed if, when the testatrix had deliberately struck out the residuary legatees from the earlier will, they should be put back again by implication, through the admission of all three documents, merely because she did not dispose of the residue in the later will.

It is convenient in the circumstances, as the parties represented by Mr. Priestley agree thereto, that the grant de bonis non (with the will annexed) should go, under s. 73, to the trustees who now hold the property.

The costs of all parties must be borne by the estate.

Solicitors for the trustees: *Crosse & Sons.*

Solicitors for the residuary legatee under the first will: *Haslam & Co.*

Solicitors for parties entitled in distribution: *Gush, Hare & Co.*

(1) 5 P. D. 106, at p. 111.

H. D. G.

THE SEA SPRAY.

1907
Feb. 4, 11.

Admiralty—Collision—Wreck raised by Thames Conservancy — Arrest by Marshal — Damage Lien — Expenses of raising — Priorities — Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 77.

As the result of a collision in the Thames between a barque and a steamship, the latter sank with her cargo. The Thames Conservators, under their statutory powers, raised the vessel, and, after she was beached, she was arrested by the Admiralty marshal in an action of damage by collision instituted by the owners of the barque. On the question of priority as between the Thames Conservancy in respect of their expenses, and the owners of the barque in respect of their lien attaching to the vessel for the damage sustained by them :—

Held by Bargrave Deane J. that, as the res had been preserved through the instrumentality of the Conservators, their claim ranked first, and, therefore, they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into Court for the benefit of the parties entitled thereto.

Motion on behalf of the Thames Conservancy as interveners in an action by default of damage by collision in which the plaintiffs were the owners of the *Cæsar* and the defendants were the owners of the *Sea Spray*.

The case raised the question as to priorities in respect of the damage lien resulting from a collision, and the right of the conservators to their expenses under s. 77 of the Thames Conservancy Act, 1894. (1)

(1) 57 & 58 Vict. c. clxxxvii., s. 77: "Whenever any vessel is sunk or stranded in the Thames, the Conservators shall cause such vessel to be raised, or to be blown up, or otherwise destroyed, so as to clear the Thames therefrom, and shall cause any such vessel and the furniture, tackle, and apparel thereof, or any part thereof respectively, which shall be raised or saved, and also all or any part of the goods, chattels, and effects, which may be raised or saved from any such vessel to be sold in such manner as they think fit, and out of the proceeds of such sale shall reimburse themselves for the expenses incurred by them under this section, and any expense incurred by them in watching or controlling such vessel, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto, and, in case such proceeds shall be insufficient to reimburse the Conservators such expenses, the deficiency shall be paid to the conservators by

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On January 9, 1907, a collision occurred in Gravesend Reach of the river Thames between the Swedish barque *Cæsar*, from Kotka to London with timber, in tow of the British steam-tug *Liberia*, and the Scotch steamship *Sea Spray*, from Beckton to Caen with a cargo of pitch. As a result of the collision the *Sea Spray* sank, and the chief engineer was drowned, the rest of the crew getting on board the *Cæsar*. The Thames Conservancy, under their statutory powers, at once proceeded to mark the position of the wreck, to watch it, and take the necessary steps for raising it. On January 14 the owners of the *Cæsar* and of her cargo and freight commenced Admiralty proceedings in rem against the owners of the *Sea Spray*. On January 15 the conservators succeeded in beaching the vessel about a mile and a half below Gravesend. On January 16, the vessel, as she lay on the foreshore, was arrested by the Admiralty marshal at the instance of the owners of the *Cæsar* with a view to the enforcement of their maritime lien for the damage sustained by them in the collision. On January 25 the solicitors for the defendants, the owners of the *Sea Spray*, gave the Thames Conservancy notice of abandonment. The Thames Conservancy, as interveners in the action, now applied to the Court to direct the marshal to withdraw in order that they might be at liberty to exercise their statutory power of selling the vessel and her cargo, and so reimburse themselves out of the proceeds for their expenses, which amounted to about 700*l*.

Feb. 4. *D. Stephens*, in support of the motion on behalf of the interveners, the Thames Conservancy. A statutory duty is imposed on the conservators to clear the river of obstructions, and for that purpose to raise, blow up, or otherwise destroy any vessel sunk or stranded in the Thames. In order to reimburse themselves for the expenses so incurred they are authorized by s. 77 of their Act to sell all or any portion of the wreck or of her cargo saved in such manner as they think

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the owner of such vessel upon demand, and in default of payment may be recovered in the same manner as any penalty imposed by this Act may be recovered, or may be recovered as a debt in any court of competent jurisdiction."

fit, holding the surplus, if any, of the proceeds in trust for the persons entitled thereto. The conservators are hindered in the exercise of these statutory powers by the presence of the marshal, who is in possession by virtue of the arrest, and they, therefore, ask for an order for the marshal to withdraw so as to enable them to sell. In *The Emilie Millon* (1) the Mersey Docks and Harbour Board were held to have a paramount claim for their dock tonnage rates as against the maritime lien of the master and crew of the vessel for wages due before she entered the dock.

A. D. Bateson, for the plaintiffs, the owners of the *Cæsar*, her cargo and freight. *The Bold Buccleugh* (2) shews that damage creates a lien on the ship causing the collision, and that this maritime lien attaches to the property in whosesoever hands it may be. It, therefore, takes precedence of any claim by the interveners in respect of the wreck, though they may deal with the cargo. If the vessel is sold by the interveners the lien will still attach. *The Emilie Millon* (1) did not decide any question of priority. All that was there held was that the Mersey Docks and Harbour Board had a statutory right to detain the vessel, that is, she could not get out of dock until the dues were paid. The best course in the interests of all parties will be for the marshal, after judgment for the plaintiffs in the default action, to sell on behalf of the Court. The interveners can then claim against the proceeds when paid into Court, and the plaintiffs will be protected.

Cur. adv. vult.

Feb. 11. BARGRAVE DEANE J. The question is whether the Thames Conservancy have a right to recover the expenses which they have incurred in raising a vessel in the river Thames in priority to the right given by a lien created by a collision.

The steamship *Sea Spray* and the *Cæsar*, a barque, came into collision in the river Thames, the result of which was that the *Sea Spray* was sunk. Immediately after the collision and sinking of the *Sea Spray* the Thames Conservancy were informed of the

(1) [1905] 2 K. B. 817. (2) (1851) 7 Moo. P. C. 267.

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fact, and under s. 77 of their Act of Parliament they at once proceeded to take charge of the vessel with a view to raise her. They did raise her, with the cargo of pitch on board, and eventually got her on to the foreshore near Gravesend. There, some days afterwards, the marshal of this Court took possession of her at the instance of the owners of the *Cæsar*, in an action in this Court against the *Sea Spray* for wrongful conduct, whereby the collision was brought about and damage was occasioned to the *Cæsar*.

The whole question is whether the Thames Conservancy, who under their Act of Parliament are entitled, having raised the vessel, to sell her and her cargo for the purpose of indemnifying themselves or reimbursing themselves for the cost of raising the vessel—whether those costs should take priority over the lien which the *Cæsar* had as against the property. Counsel on behalf of the owners of the *Cæsar* argued that, inasmuch as the lien which the *Cæsar* had upon the *Sea Spray* took effect immediately after the collision, that lien took priority over the right of the Thames Conservancy. I have to decide that simple question, and, in my opinion, the Thames Conservancy have the priority. Supposing that this vessel had sunk in deep water, and not in the river Thames, where she could not have been recovered, the lien would have been of no use to the *Cæsar*. There would have been no res which could be seized by the marshal, and upon which a claim could have been founded. But for the action of the Thames Conservancy the res would not have been in existence, or, rather, if in existence it would have been in such a place that it could not have been touched by the marshal.

The short point upon which my judgment is based is that, inasmuch as the property was conserved by the Thames Conservancy, the conservators have a right, in priority to the *Cæsar*, to the proceeds of the vessel when sold. The Thames Conservancy must sell the *Sea Spray* and her cargo and separate the amounts received from both. They must then reimburse themselves their costs, and their expenses of raising, out of the proceeds, first exhausting the proceeds of the sale of the cargo, and the balance of the proceeds they must bring into Court.

The costs of the owners of the *Cæsar* will be treated as costs in the cause. 1907

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Solicitor for interveners: *The Solicitor to the Thames Conservancy.*

Solicitors for plaintiffs, owners of the *Cæsar: Stokes & Stokes.*

T. L. M.

[IN THE COURT OF APPEAL.]

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Feb. 11, 13.

Admiralty—Collision—Action in rem—Action "against any Person"—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*a*).

The provision in s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893, limiting the period to six months, next after the neglect or default complained of, within which an action can be commenced against any person included in the Act, does not apply to an Admiralty action in rem.

The Longford, (1889) 14 P. D. 34, followed.

APPEAL by defendants, the London County Council, owners of the steamship *Burns*, against the refusal of Bargrave Deane J. to set aside the writ, in an action in rem for damage by collision, issued by the plaintiffs, the owners of cargo lately laden on board the steamship *Gervase.*

The case raised the question whether s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893 (1), applied to an Admiralty action in rem so as to preclude such an action being instituted

(1) 56 & 57 Vict. c. 61: "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

Sect. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding, is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. . . . ."

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against a vessel belonging to a public authority after the expiration of six months from the default complained of.

On January 24, 1906, a collision occurred in the river Thames between the steamship *Burns* and the steamship *Gervase*. The *Burns* was at the time being navigated down Barking Reach by servants of the London County Council, and was engaged in carrying out work which was part of the public duties imposed upon the council by the Metropolis Local Management Acts, that is to say, she was conveying sewage from the outfall works at Beckton to Barrow Deep, at the mouth of the Thames.

On October 25 a writ, in an action in rem, was issued by the owners of cargo on board the *Gervase* to recover the damage they had sustained by reason of the collision.

On January 22, 1907, the defendants, the London County Council, moved before Bargrave Deane J. to set aside the writ in, and dismiss the defendants and their bail from, the suit, and to condemn the plaintiffs in costs as between solicitor and client, on the ground that the same was barred, under the Public Authorities Protection Act, 1893, not having been commenced within six months next after the neglect or default complained of.

On behalf of the defendants it was contended that an action in rem was an "action, prosecution, or other proceeding" against "a person" within the meaning of s. 1 of the Public Authorities Protection Act, for the writ was addressed to the "owners and parties interested in the vessel," and the object of the arrest was to secure satisfaction of the judgment that might be given, and if the owner desired to prevent the condemnation and sale of his vessel he could do so—as the London County Council had done—by entering an appearance, when the action proceeded as a personal action, the arrest being in effect a mode of compelling the appearance of the owner, and if the vessel was found to blame, by reason of the negligence of the servants of the owner, the owner became personally liable for the damage sustained in excess of the value of the res: *The Dictator* (1); *The Gemma*. (2)

On behalf of the plaintiffs it was urged that the Public Authorities Protection Act is limited to proceedings against

(1) [1892] P. 304. (2) [1899] P. 285.

public authorities personally, and does not apply to proceedings against their property, as in the case of an action in rem, which could not be brought within the meaning of the Act of 1893 except by additional words which were not to be found in s. 1. The action in rem was based on a maritime lien attaching at the moment of the collision. This lien, apart from laches, could be enforced at any time, as the statutes of limitation, of which the Act in question was one, did not apply: *The Kong Magnus*. (1)

BARGRAVE DEANE J. I had some doubt whether I should not take time to consider this case, because possibly it may go further, but as I have formed a strong opinion on one point which I think concludes the case, I do not propose to delay my decision.

Here is an Act of Parliament which limits the rights of private individuals against public authorities, and therefore that Act of Parliament must be construed strictly. The Act says in express words "action, prosecution, or other proceeding . . . . against any person." Now, this is an action well recognized in law—an action in rem—and I am asked to read into the Act of Parliament, after the words "against any person," the words "or any action in rem." I do not feel that I am justified in reading these words into the section, and therefore my view is that this action in rem is not within the Act. I see all the difficulties and quite appreciate the force of the arguments which have been addressed to me by counsel for the defendants, and on looking at *The Dictator* (2), which was approved by the Court of Appeal in *The Gemma* (3), it is clear that in the opinion of the learned judge in that case if the owners appear in an action in rem to contest the suit, by their appearance they become responsible not only for the amount of the res, but beyond that for any extra damage which the res might not cover. If that be so, and if that is good law, then it might be that the county council in this case, by appearing to defend an action in rem, would be bringing themselves within this Act, as being the persons against whom, by the force of circumstances, the action is brought. I am not going to decide

(1) [1891] P. 223. (2) [1892] P. 304.

(3) [1899] P. 285.

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that point now. It may more properly be decided when the action is tried. At present, so far as I can see, the action is limited to the value of the res, and it is not an action in personam against the owners. Therefore in my opinion this action is not within the Act of Parliament, and the provisions of the Act saying that such an action must be commenced within six months after the date of the accident do not apply. I decide the matter strictly on the words of the statute, and dismiss the motion with costs; but give leave to appeal.

The appeal was set down in the interlocutory list, and, on February 11, came before two judges of the Court of Appeal, but, after the opening by counsel for the appellants, the case stood over in order that it might be heard by three judges.

Feb. 13. *Scrutton, K.C.*, and *A. D. Bateson*, for the appellants, the London County Council, owners of the steamship *Burns*. The writ in this case should be set aside, for by the Public Authorities Protection Act, 1893, s. 1, sub-s. (*a*), no action, prosecution or other proceeding, against any person included in the Act, will lie unless it is commenced within six months next after the act, neglect, or default complained of. By the Interpretation Act, 1889, "person" includes a "corporation," and the servants of the London County Council in charge of the *Burns* were, at the time of the collision, engaged in the execution of a public duty. The defendants are, therefore, entitled to claim the benefit of the protection afforded by the Act, unless an action "in rem" is not a proceeding against a person within the meaning of the Act. In the case of *The Dictator* (1)—where the plaintiffs were allowed to sue out writs of fieri facias in order to enforce payment from the defendants personally of the sum of 7500*l.*, the amount awarded in an action in rem for salvage services, although the claim indorsed on the writ was for 5000*l.* only—it was strenuously argued that the defendants could not be made liable beyond the amount of the undertaking to put in bail which represented the res; but in the elaborate judgment of Jeune J., where all the authorities are collected, the ancient practice of the Admiralty

(1) [1892] P. 304.

Court is set out at length, and it is shewn that the ship, or any property of the defendant within the Admiralty jurisdiction, could be seized, the object of the arrest being to compel the appearance of the defendant who was liable to pay the full amount of the sum decreed against him, in other words, the distinction between actions in personam and actions in rem depended on whether the person or the property of the defendant was arrested in the first instance, and, if the defendant appeared, the procedure and effect of the action in rem became those of an action in personam. In reviewing the cases on this subject Jeune J. refers to Lord Blackburn's remarks in *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (*The Khedive*) (1) that, in the case of *The Dundee* (2), "Lord Stowell treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by a seizure of the ship, the recompense in damages decreed by that Court could be enforced against the owners out of all their property of every kind." The decision in *The Dictator* (3) was approved by the Court of Appeal in *The Gemma* (4), where, in an action in rem of damage by collision, the owners of the foreign vessel, which had been found in fault, were held, by appearing, to have rendered themselves personally liable, with the result that, the damages proving to be in excess of the amount of the bail—which had been given for the full amount of the vessel and her freight—payment of the balance was enforced by a writ of fi. fa. against any of the goods and chattels of the defendants, including the released vessel, within the jurisdiction.

The owners, therefore, by appearing, are before the Court, not only for the purpose of protecting their interest in the res, but also for the purpose of protecting their own personal liability, so that an action in rem falls within the words of the Act of 1893, "any action, prosecution, or other proceeding against any person," for actions in rem and actions in personam are, in the end, merely different ways of proceeding against the person. In *The Parlement Belge* (5) it was held that an unarmed packet belonging to

(1) (1882) 7 App. Cas. 795.
(2) (1823) 1 Hagg. Adm. 109.
(3) [1892] P. 304.
(4) [1899] P. 285.
(5) (1880) 5 P. D. 197, at p. 213.

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the sovereign of a foreign State was not liable to be seized in a suit in rem to recover redress for a collision, for—as stated by Brett L.J. in delivering the judgment of the Court—"the liability to compensate must be fixed not merely on the property but also on the owner through the property," so that "the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court."

The statutory form—No. 11, Part I., of the appendices to the Rules of the Supreme Court, 1883, Order II., r. 7, in force under s. 100 of the Judicature Act, 1873—of a writ of summons in an Admiralty action in rem, which must issue before the vessel can be arrested, indicates clearly that the defendants are personally sued. The material words are: To the *owners* and parties interested in . . . . we command *you* that . . . . *you* do cause an appearance to be entered for *you* in . . . . and take notice that in default of *your* so doing . . . . judgment may be given in *your* absence.

Laing, K.C., and *Balloch*, for the respondents (plaintiffs), the owners of cargo lately laden on board the steamship *Gervase*. An action in rem is not an action against "any person" within the meaning of the Public Authorities Protection Act, 1893, which Act is to be construed strictly, as it limits the rights of individuals against public bodies: see per Butt J. in *The Longford* (1), a case undistinguishable from the present. The writ in rem is served on the ship and not on any person. It is true that the writ now in use is addressed "To the owners and parties interested," but it is not addressed to the owners by name. It is also true that, as a matter of procedure, Admiralty suits since the Judicature Act are called "actions," but this cannot alter the law so as to deprive Admiralty actions in rem of their distinctive character.

The remedy in rem is founded on a maritime lien upon the thing proceeded against. In the judgment in *The Bold Buccleugh* (2) it is stated that this lien is defined by Lord Tenterden to mean "a claim or privilege upon a thing to be carried into effect by legal process," and that "Mr. Justice Story explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty

(1) 14 P. D. 34, at p. 36.

(2) (1851) 7 Moo. P. C. 267.

enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. . . . . This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached." This judgment was approved by the House of Lords in *Currie* v. *McKnight* (1), and there is nothing in *The Dictator* (2) or *The Gemma* (3) which conflicts with this view, for they only shew that, if the defendant owner appears, he may become personally liable, whereas the action in rem being an action against a thing, if the defendant does not appear, the plaintiff proceeds to get judgment and to enforce it by sale of the property. The London County Council, as a public authority, could not, by failing to appear, deprive the plaintiff of this right, that is to say, as the cause of action remains, it can be enforced, although the defendant does not appear, and, if the vessel were sold, the plaintiff could proceed against the vessel in the hands of the purchaser; but if the contention of the defendants is to prevail, then, if the vessel proceeded on a voyage extending over a period of six months, and the public authority retained the ownership, the plaintiff would be deprived of his remedy altogether.

[They were stopped by the Court.]

Scrutton, K.C., in reply. The grounds of the decision in the case of *The Longford* (4) were mainly that, when the Act of William IV., there referred to, was passed, the word "action" was not applicable to the procedure of the Admiralty Court; secondly, that the Admiralty Court was not, at that time, one of His Majesty's Courts of law. Neither of these objections now hold good. In *The Bold Buccleugh* (5) two questions arose, first, whether the proceedings ran against a purchaser for value without notice, and, secondly, as to the difference in the proceedings commenced in England and in Scotland, involving the consideration of the nature of a lien. These questions do not

(1) [1897] A. C. 97.
(2) [1892] P. 304.
(3) [1899] P. 285.
(4) 14 P. D. 34.
(5) 7 Moo. P. C. 267.

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affect the present contention as to the personal liability of the owner after appearance in an action in rem.

[The following cases and text-books were referred to: *Johnson* v. *Shippen* (1); *The Heinrich Björn* (2); *The Sara* (3); *The Zeta* (4); *The Ripon City* (5); *The Ydun* (6); *Lyles* v. *Southend-on-Sea Corporation* (7); Marsden's Select Pleas in the Court of Admiralty, vol. 1 (Selden Society's Publications, vol. 6, 1894), pp. 71, 72; Carver's Carriage of Goods by Sea, 4th ed., s. 698; Williams and Bruce's Admiralty Practice, 3rd ed. (1902), p. 86; Roscoe's Admiralty Practice, 3rd ed. (1903), by Roscoe and Mears, p. 44, note (*c*).]

COLLINS M.R. This is an appeal from a judgment of Bargrave Deane J. in a case where proceedings have been taken by the plaintiffs in consequence of a collision between a vessel owned by them and the *Burns*, which is owned by the defendants, and the point that arose from the learned judge's decision was, whether, under the circumstances, and having regard to the cause of action, the provisions of the Public Authorities Protection Act, 1893, applied so as to limit the period to six months within which a claim might be put forward against the defendants.

The section of the Act upon which the defendants rely is s. 1, sub-s. (*a*). [The learned judge read the section and the preamble to the Act, already set out, and continued:—] In the Court below the learned judge came to the conclusion that this particular case did not fall within the provisions of the section I have just read, because he held that the proceeding, being a proceeding in rem, could not be brought within the words of the section.

In the view that I take of this case it will not be necessary to criticize the authorities which were so ably placed before us by counsel for the appellants. I think they have established—certainly to my satisfaction—that the proceeding in rem does indirectly affect the owners, that is to say, it indirectly affects them as persons, but it is only indirectly that it does affect them.

(1) (1704) 2 Ld. Raym. 982, at p. 984.
(2) (1886) 11 App. Cas. 270.
(3) (1889) 14 App. Cas. 209.
(4) [1893] A. C. 468.
(5) [1897] P. 226, at pp. 241, 242.
(6) [1899] P. 236.
(7) [1905] 2 K. B. 1.

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The point has been considered in this Court in a very analogous case by which we are bound, and I do not think it is desirable that we should take subtle distinctions between earlier cases decided in this Court and the case before us; but should, as far as possible, loyally carry out the principles established by the earlier cases. I am therefore not inclined to dwell—though I could do so if necessary—on the technical distinctions which might be taken between the case before us and the case to which I am about to refer, that of *The Longford* (1), decided in this Court in 1889. The head-note to that case in the *Law Reports* runs thus: "By 6 & 7 Will. 4, ch. c., s. 8, no action shall be brought in which the City of Dublin Steam Packet Company shall be liable for any damage to any ship against such company, unless one month's notice in writing shall have been given to the company:—Held, that the word 'action' in s. 8 did not apply to an action in rem." Butt J., whose decision was affirmed, says, in the opening of his judgment: "This is an action in rem, arising out of a collision which occurred on the high seas between the steamers *Dublin* and *Longford*. The defendants have pleaded that this action cannot be maintained unless the plaintiffs gave one calendar month's notice of action, and it is not denied by the plaintiffs that such notice has not been given. The question is, whether this is an action against the company within the meaning of the section which has been referred to in the pleadings and arguments. It is not in name an action against the company, neither in my opinion is it in substance an action against the company, because it is clear that, in such an action as this, the claim against the ship may result in a judgment for a smaller amount than might be recovered against the company. Thus the plaintiffs' vessel might be damaged to the extent of 1000*l*. The defendants' ship might be worth only 500*l*., and so only 500*l*. could be recovered in an action in rem. The remedy against the ship is therefore not co-extensive with the remedy against her owners. This is a section that ought to be construed strictly." The case then came up to this Court, and Lord Esher, in his judgment, refers

(1) 14 P. D. 34.

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to one or more cases which have been cited before us to-day, and says: "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed. It has been said that the Judicature Act must be looked to as evidence of what the law was before it was passed; but that Act merely alters the procedure, and neither it, nor the existing forms which take their rise from it, are evidence of what the procedure was before it became law. We have also been referred to the case of *The Parlement Belge* (1), but the most that can be collected from that decision in reference to this case is that an action in rem is not the same as an action in personam, though it may indirectly affect the owners of, or persons interested in, the ship. The word 'action' mentioned in the section in question was not applicable, when the Act was passed, to the procedure of the Admiralty Court. Admiralty actions were then called 'suits' or 'causes'; moreover, the Admiralty Court was not called, and was not, one of His Majesty's Courts of law. It originally derived its jurisdiction from the Lord High Admiral, and not from the King. But be that as it may, this is clearly not an action within the meaning of the word 'action' in the section under notice." Bowen L.J. gave judgment to the same effect. He says: "The first question is whether when this Act was passed this section was intended to include within its scope actions in rem or only actions in personam. If we were to consider that this section intends to prescribe that notice of action must be given one month before any suit in rem is brought in the Admiralty Court, two consequences would follow. In the first place we should have to hold that a number of words here, which are perfectly intelligible in their ordinary sense, are used in a distorted and unusual sense. The words are 'no action in any of His Majesty's Courts of law to which the company shall be liable.' We should have to apply the word 'action' to a suit in the Admiralty Court and to hold that it—the proper title of which is the High Court of Admiralty—was one of His Majesty's Courts of law within the meaning of the section, when it was not a Court of law at all. We should have also to hold that an action in rem, which really begins by proceedings against

(1) 5 P. D. 197.

the ship, though they no doubt have the result of citing before the Court the owner of the ship in person, is an action in the ordinary meaning of the word, which can be prosecuted against the company; we should thus be doing violence to the language of the Act of Parliament." And then Bowen L.J. proceeds to point out the particular mischief which would arise if they gave effect to the provisions in that particular case.

It seems to me that that case in substance decides that there is a real, and not a mere technical, distinction between an action in rem and an action in personam, and it decides that in a case where, taking what I may call the technical view of the matter, the Court defeated a provision which had certainly been made for the benefit of a particular company, the Dublin Steam Packet Company. It seems to me that that being the decision of this Court, and really resting upon the very grounds pressed before us in argument here to-day, we should be making a super-subtle distinction if we held that that case did not apply to the case before us. Speaking for myself, I am quite prepared to admit the argument of counsel for the appellants up to this point, that I think the owners are indirectly concerned in the action in rem, and if the matter were absolutely res integra, having regard to the purpose of the Act, to protect public authorities, I should have been very much disposed to treat them as coming within that protection where their property was affected by the proceedings taken against them, and therefore they themselves indirectly were persons against whom a proceeding was commenced in the United Kingdom. The argument was addressed to them in a very urgent form, inasmuch as it threatened them with the loss and confiscation of a vessel which belonged to them, and that certainly was a matter which anyone but a lawyer would say affected the persons who owned the thing. Therefore, I would certainly say it was a proceeding against the persons whom the Legislature had thought fit to protect, and which might have very well, without any very great straining of the meaning, been construed to embrace proceedings in rem against the London County Council, as well as proceedings directed against the persons owning the ship. I think, however, that the point really came up for discussion in an Act

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almost in terms the same as this Act, and I think that the distinction between the two is too subtle to justify us in acting upon it here. Upon these grounds, therefore, I am of opinion that the judgment given in the Court below was right and must be affirmed.

COZENS-HARDY L.J. I agree and have nothing to add.

FLETCHER MOULTON L.J. I have come to the same conclusion. The very able argument of counsel for the appellants rests upon the contention that the process of arrest of a vessel in virtue of a maritime lien created by the circumstances of a collision is merely a method of enforcing an appearance in an action. In other words, that an action in rem in no way differs in its nature from an action in personam; save that there is attached to it a means of compelling the appearance of the defendant by arrest of the vessel.

I am of opinion that this view cannot be supported. The two cases upon which counsel have chiefly relied—*The Dictator* (1) and *The Gemma* (2)—appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action in personam. In other words, it is not the institution of the suit that makes it a proceeding in personam, but the appearance of the defendant. And further, I think that the contrary is conclusively established by the case of *The Bold Buccleugh* (3), supported and approved as it was by the House of Lords in the case of *Currie* v. *M'Knight*. (4) A passage from Lord Watson's judgment in the latter case enunciates this contrary proposition in the clearest way. He says (5): "And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim

(1) [1892] P. 304.
(2) [1899] P. 285
(3) 7 Moo. P. C. 267.
(4) [1897] A. C. 97.
(5) Ibid. at p. 106.

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against her owners, who may have no substantial interest in her and may be without the means of making due compensation."

I am, therefore, of opinion that the fundamental proposition of the argument of the appellants' counsel fails, and that the action in rem is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified. The decision of an action against a person whom the London County Council had indemnified might affect the London County Council, but that fact would not make the action an action brought against them within the meaning of the Public Authorities Protection Act. The only possible support, in my opinion, for the proposition put forward by counsel for the appellants is to be found in the language of the writ itself by which the action in rem is now commenced; but I am of opinion that this ought not to weigh with us. If the old form of warrant is looked at by which the arrest of a ship used to be made, the language in no way supports the contention of the appellants. On the contrary, it is evident from the language of that warrant that the process was regarded then as being directed against the ship itself. That old form was abandoned, and a new form of writ was employed, by direction of those who were responsible for drawing up the Forms under the Judicature Act. I think it was in 1883 that the rule was passed which directed the present form of writ to be issued in Admiralty actions in rem. The direction itself shews that, whether the language was felicitous for the purpose or not, the writ was intended to apply to the old-established Admiralty action in rem, and was not intended to have the effect of creating a new type of action or altering the nature of the action; and when we turn to the form which was at the same time prescribed for the writ of possession in an Admiralty action in rem, where there had been a default of appearance, we

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find that the language is quite suitable, and shews that the proceeding is against the ship itself. But, in any case, I do not think that we are entitled to suppose that there has been a change in the nature of the action in rem merely because the modern language of the writ by which it is now commenced is unsuitable to that which I think the authorities establish to be its real nature. If we turn to the case which has been cited by the Master of the Rolls—*The Longford* (1)—it will be seen that the Court, being perfectly aware of all the provisions of the Judicature Act, decided that they have made no difference in the nature of the action in rem. I am therefore of opinion that the Public Authorities Protection Act does not apply to an action in rem, such as the present action against the steamship *Burns*.

Appeal dismissed.

Solicitors for appellants (defendants), owners of the *Burns*: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for respondents (plaintiffs), owners of cargo on board the *Gervase*: *Thomas Cooper & Co.*

(1) 14 P. D 34.

T. L. M.

[IN THE COURT OF APPEAL.]

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1907
March 13.

THE ANSELM.

Admiralty—Collision—"All Waters connected" (with the High Seas) "Navigable by Sea-going Vessels"—"Taking any Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, Preliminary and arts. 28, 30.

It is too late now to question, in the Court of Appeal, the validity of the direction in the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, that they are not only to be followed by all vessels upon the high seas; but "in all waters connected therewith navigable by sea-going vessels," and the reservation by art. 30 of any "special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters," shews that the general regulations were intended by their framers to apply to inland navigation except so far as they would interfere with the operation of a local rule.

The Uskmoor, [1902] P. 250, approved in respect of the interpretation there put upon the word "authorized" in art. 28—which deals with the indication by sound signals of the course taken with reference to another vessel in sight—so that the word includes the case of reversing the engines, where a vessel, not being bound to do it, does so for the purpose of avoiding risk of collision. If, therefore, in such a case, a collision occurs, and the three-short-blast signal has not been given at the appropriate time to indicate the course taken, the omission will, in the absence of proof to the contrary, be deemed to have by possibility contributed to the collision.

Appeal (1) by plaintiffs, owners of a portion of the cargo lately laden on board the *Cyril*, in an action of damage by collision, against a decision of Bargrave Deane J. in favour of the defendants, the owners of the *Anselm*.

The case is reported on the question whether the Regulations for Preventing Collisions "at Sea" apply to the navigation of the Para estuary of the river Amazon, in South America, by reason of the words in the preliminary article, "and in all waters connected" with the high seas "navigable by sea-going vessels" (2); and further, whether the words "any course authorized," in

(1) Heard, by consent, by two judges of the Court of Appeal, with nautical assessors.

(2) "Preliminary" article to Regulations, 1897: "These rules shall be followed by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels."

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art. 28 (1) of the same regulations, include the case of reversing the engines, where those in charge of the steam vessel are not bound to do so, but take that course for the purpose of avoiding risk of collision.

On September 5, 1905, at about a quarter past seven on a fine clear morning, the wind being easterly, light, and the tide flood of the force of about a knot, a collision occurred off Carnaticu island, in the Para estuary of the river Amazon, in Brazil, between the steamship *Cyril*, belonging to the respondents (defendants), the Booth Steamship Company, Limited, of 4380 tons gross register, proceeding seawards, from Manaos to Liverpool, with mails, passengers, and cargo—including cargo of the appellants (plaintiffs), consisting of cases of rubber, carried under a bill of lading excepting negligence of the crew of the *Cyril*—and the steamship *Anselm*, also belonging to the respondents (defendants), of 5442 tons gross register, proceeding up the estuary, from Para to Manaos, with passengers and general cargo.

The circumstances attending the collision, which resulted in the *Cyril* shortly afterwards foundering, are fully set out in the following judgment delivered in the Court below on March 28, 1906. The appellants (plaintiffs), as owners of a portion of the cargo per the *Cyril*, were without knowledge as to the navigation of the *Cyril*, or of the *Anselm*, before and at the time of the collision, and prepared the preliminary act and statement of claim on the best particulars of facts relating to the collision, and the alleged negligence of the *Anselm*, that they were able, from the documents in the case, to give. They charged the respondents, as owners of the *Anselm*, with failure to comply with the Regulations for Preventing Collisions at Sea in respect

(1) Art. 28: "Sound signals for vessels in sight of one another:—

"The words 'short blast' used in this article shall mean a blast of about one second's duration.

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle, or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean, 'I am directing my course to port.

"Three short blasts to mean, 'My engines are going full speed astern.'"

of arts. 23 (slackening speed, or stopping, or reversing), 28 (sound signals when in sight), and 29 (proper precautions). The respondents (defendants) charged those on board the *Cyril* with neglect to comply with arts. 18 (port to port), 22 (avoiding crossing ahead), 23 (slackening speed, or stopping, or reversing), 25 (narrow channel, starboard side), and 29 (proper precautions), of the same regulations.

BARGRAVE DEANE J. This is a case of a peculiar character, because it is brought by the owners of cargo on board the *Cyril* for damage occasioned to that cargo by reason of the *Cyril*, the vessel which was carrying the cargo, being sunk in collision with another vessel.

The case is complicated by reason of both vessels that were in collision being owned by the same owner. The evidence therefore has been practically all on one side, because the plaintiff owners of the cargo could not go into the enemy's camp to get evidence from either of these ships for the purpose of shewing that one or other of the ships was to blame, and consequently counsel on their behalf contented themselves with putting in the log, the scrap log, the report of the master, and some correspondence, to support their case that the collision was caused, not by one, but by the negligence of both of these vessels, and, if they are right, of course the owner of the cargo has a claim against the wrong-doing vessel which was not carrying the cargo.

As regards the *Cyril*, which was carrying the cargo, I need not go into that, because it is said that the bill of lading exempted the *Cyril* from negligence by her crew. The only question which I have to consider is whether the *Anselm* was partly to blame for this collision.

It is manifest from the documents put in on behalf of the plaintiffs that the 28th rule of the Regulations for Preventing Collisions at Sea was not obeyed by those on board the *Anselm*, and, therefore, prima facie, there was negligence on the part of those on board the *Anselm*. But one has to go a step further, because they may be guilty of negligence in certain respects, but that negligence may have nothing whatever to do with the injury

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which was brought about. As a matter of fact I have first to consider whether there has been a breach of the regulations.

The two vessels were proceeding, one up, and the other down, the Para estuary of the river Amazon, in South America, and they were approaching, according to the evidence before me, end on. They were first sighted at some considerable distance apart one from the other, but I need not trouble exactly how far they were apart when first sighted. I will bring it to a distance of something like two miles, because, looking at the little chart which has been put in, and which is a reduced plan of the Para at the place in question where the collision occurred, there was a bend at the point—an elbow there—and these vessels were approaching that bend, and I think at about two miles, as far as I can take it from the chart, they will be end on, if they are both navigating in mid-channel.

Two vessels, approaching each other end on, ought to port in order to pass port to port; but there is also the narrow channel rule, which says that they shall each keep their own starboard side of the channel. The vessel which was coming down, the *Cyril*, should have ported to keep on her starboard side, under one rule, and she should have ported to have passed clear of the other vessel under the other rule. She did not. She starboarded. Therefore she was clearly to blame in that respect. So far as we know from any evidence, she did not blow any whistle signal at the time when she starboarded. But—and this is a material fact in the case—the whole of the events took place in broad daylight, when the movements of each ship were clearly visible from the other ship. She was seen to starboard, therefore those on board the *Anselm* knew that she was starboarding. When did she starboard? The evidence is perfectly clear that it was one and a half to one and three-quarter miles away. I have now to proceed to examine in effect the movements of the *Anselm*.

The *Anselm* was in charge of the chief officer, but he had left the deck after the *Cyril* had been sighted, and he left the bridge and the navigation in charge of the fourth officer. When he came back on to the bridge he found that the *Anselm* had ported under the directions of the pilot a little, and, without steadying, had continued to port a little more without blowing her whistle;

and the fourth officer says that before the chief officer returned to the bridge, and he had ported a little more, he noticed after that that the *Cyril* was starboarding. The chief officer corroborates that. He says that when he got on to the bridge he asked what they were doing, and they said they had ported, and he then observed that the other vessel was starboarding, and he at once then gave a short blast on the whistle to indicate that he was directing his course to starboard under the 28th rule.

The first question which I have to ask myself is: Did the fourth officer thereby commit a breach of the regulations by not sounding his whistle one short blast when he first ported? I am of opinion that the rule is conclusive on that matter. Counsel for the defendants contend that there is nothing in the rule to say you shall do it at the same time as you commence to direct your course to starboard, but my own feeling is that the fourth officer should have sounded the whistle one short blast when he first ported. He certainly should have sounded it when he had decided to continue his course to starboard by continuing his port helm, and this he says he did without steadying until he brought his ship two points off. I say that was a breach of the regulations. It does not follow that the breach of the regulations had anything to do with this collision. When the chief officer got on deck he sounded a short blast, and according to the scrap log, which was kept by the fourth officer, that was two minutes approximately after he had first begun to port, because the scrap log says: "Ported a little at 7.10; ported more at 7.11; sounded a short blast at 7.12." It was only a very slight porting, because in two minutes he only went off two points, but he never steadied, and by that time, when his vessel had gone off two points, it was visible to those on board the *Anselm* that the other vessel was starboarding.

In my opinion what was visible to those on board the *Anselm* was also visible to those on board the *Cyril*. They must have seen before they starboarded that the *Anselm* was going off to starboard under a port helm, and in this matter I am of opinion, and the Elder Brethren agree with me, that in broad daylight at two miles distant the port helm signal, although it ought to have been given by the rules—"shall indicate that course," saith the

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rule—in my opinion on this occasion that which was being done on board the *Anselm* was visible to those on board the *Cyril*, and that the port helm signal did not affect the matter, because, having had the opportunity for the space of a minute, or a minute and a half to two minutes, and seeing the *Anselm* porting paying off to starboard as much as two points, after that, those on the *Cyril* starboarded, and threw her up across the course which she saw the *Anselm* was taking.

That disposes of the first breach of the rule. Both vessels continued on, but one under a hard-a-port helm, and the other under a starboard helm, and three minutes before the collision—and that would be a minute after the first signal was given—the chief officer determined to reverse his engines, which he did, and the only evidence which is given before me is the fact that the scrap log says it was done at 7.13. No signal was sounded when those engines were reversed, although the rule says that when the engines are reversed three blasts shall be given on the whistle denoting that fact.

Here again was a distinct breach of the rule, and a breach which I think it is my duty to say is a serious breach. It cannot be too strongly impressed upon officers in charge of ships that they must obey the regulations. If they do not obey the regulations they run a very serious risk. Here again I have to ask myself the question—and I have the advantage of the Elder Brethren's advice. In our opinion his not obeying the regulations did not in this case contribute to the collision.

That disposes of that part of the case. Then I have to go a step further, and it is a most difficult problem: Was there any possibility, if these regulations had been obeyed, that those on board the *Cyril* might have avoided this collision? In other words, taking the cases which have been cited, have counsel who appear for the *Anselm* satisfied the Court on the evidence that the collision was brought about notwithstanding the breach of those regulations, and that by no possibility could that breach have in this case affected the result?

In my opinion—and the Elder Brethren here again agree with me, it is a nautical question—the defendants, on the evidence before me, have discharged that burden, and I think that the

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whole fault of this collision was caused, not by any possibility of a mistake, because everything was done in broad daylight and could be seen, but by an absolute error of judgment by those on board the *Cyril*, quite regardless of any signals that might have been given by those on board the *Anselm*.

There is one other point that is material, and that is the speed at which these two vessels were going. One vessel was going twelve and a half to thirteen knots, and the other was going fourteen knots, a joint speed of a total of twenty-seven knots, which puts it at about a mile in two minutes I think, or 913 yards in a minute, which is not quite half a nautical mile.

The one vessel was going appreciably faster than the other, till they had come to a certain point; one vessel in that distance under a port helm went off six points, and the other one under a starboard helm went off four and a half. Here again it is a nautical question. I am advised—and it is impossible not to see it—that the one vessel must have ported considerably before the other starboarded. It is, therefore, perfectly plain that the question of the signalling in this particular case had nothing to do with the collision. It was perfectly apparent to the people on both these ships what each was doing. The only doubt I had in the case was this—and I have put it to the Elder Brethren—whether, as soon as the starboarding was seen by those on board the *Anselm*, they ought not to have stopped and reversed immediately. They are of opinion that that which was done was the correct procedure, and they point out to me, as an example, what happens to people crossing the street sometimes. They began by taking the right manœuvre of porting, and then they found that somebody else was starboarding across their bows. If they had altered, if they had shilly-shallied, in that course, they would have been no doubt to blame, but they took the right course, and ought to have proceeded, as they did, in the same course, and ought not to have left the other vessel in any doubt as to whether they were going to starboard or port—they kept the course they were taking.

For these reasons I am of opinion that the only blame in this case attachable is the blame attachable to the *Cyril*, and that the defendants, so far as it is possible for them to do so, have satisfied

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the Court on the evidence that the disobedience to these regulations had no possible effect on the collision.

Therefore there will be judgment for the defendants.

On appeal:—

1907. March 13. *Aspinall, K.C.*, and *Balloch*, for the appellants (plaintiffs), owners of cargo on board the *Cyril*. The *Anselm* was to blame, for those in charge of her did not, in the first instance, give the appropriate sound signal on porting, They also negligently waited two minutes, after observing the *Cyril* to be starboarding, before they reversed, and when they did reverse they omitted to give the three-short-blast signal, which, like the port helm signal, is made imperative by art. 28 when "taking any course authorized or required by these rules." The word "authorized" has been interpreted in *The Uskmoor* (1) to include any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight, and, therefore, the *Anselm* was bound to indicate to the other vessel by signal what she was doing. If those in charge of her had done so, those on board the *Cyril* would have had their attention pointedly drawn to the movements of the *Anselm*. The neglect to whistle was a breach of the regulations which the defendants have failed to prove could not by possibility have contributed to the collision.

Sir R. Finlay, K.C., *Laing, K.C.*, and *A. D. Bateson*, for the respondents (defendants), owners of the *Anselm*. The rules relied on by the appellants did not apply to the navigation of these vessels in the Para estuary of the river Amazon, and, therefore, there was no breach within the statute. The Regulations of 1897 are scheduled to an Order in Council made under sub-s. 1 of s. 418 of the Merchant Shipping Act, 1894, by which power was given to make regulations for the prevention of collisions at sea, and the heading "Regulations for Preventing Collisions at Sea" is in accordance with those powers; but the words in the preliminary article, "and in all waters connected therewith," go beyond the terms of the section of the

(1) [1902] P. 250.

statute in question, and are ultra vires. In *The Hare* (1) Gorell Barnes J. held that the regulations do not apply to the Manchester Ship Canal, and the learned judge in that case refers to the question of local rules under art. 30 of the regulations, and also to his observations in *The Carlotta* (2) on the application of the sea rules to inland waters such as the Thames.

[*Aspinall, K.C.* This point was not taken in the Court below.]

That does not prevent the point being considered in this Court: see per Lord Herschell in *The Tasmania.* (3)

Assuming, however, that the regulations do apply, nevertheless the statutory presumption does not follow if the breach could not by possibility have contributed to the collision: see *The Englishman* (4), referred to in the judgment of the Privy Council in *The China Merchants' Steam Navigation Co.* v. *Bignold.* (5) When the *Anselm* first ported as a precautionary measure, under art. 18, the vessels were at least two miles away, and it was broad daylight, so that a one-blast signal at that time was quite unnecessary, and that is what the learned judge in the Court below, on the advice of the Elder Brethren, has substantially found. It is also to be observed that the effect of the porting was to bring the vessels port to port, and, therefore, the risk, if any, previously existing was determined, but when the *Cyril* was seen to be starboarding, the signal was properly given under art. 28 as an indication that the course of the *Anselm* was being directed to starboard. There was, therefore, no breach of the rule, and if there were, it had no effect on the collision.

With regard to the alleged negligence in not reversing sooner, the learned judge has, on the advice of the Elder Brethren, found as a fact that it was done in sufficient time, as the order was given three minutes before the collision, and with that finding this Court will not interfere. As regards the failure to sound the three-blast signal on reversing, it is submitted that the point taken by the appellants, under art. 28, has no application to the circumstances of this case, for the word "authorized" in that

(1) [1904] P. 331.
(2) [1899] P. 223.
(3) (1890) 15 App. Cas. 223, at p. 225.
(4) (1877) 3 P. D. 18.
(5) (1882) 7 App. Cas. 512, at p. 516.

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article is used in respect of such cases as when, for example, under art. 17, two sailing vessels are approaching one another so as to involve risk of collision, or, under art. 19, two steam vessels are crossing, and one of them has to keep out of the way, in which cases the one which has to keep out of the way is authorized for that purpose to take such steps as she may deem necessary. So in art. 20, with reference to a steam vessel keeping out of the way of a sailing vessel. So, in art. 24, with regard to the overtaking vessel, and, in art. 26, in respect of sailing vessels keeping out of the way of fishing vessels, but, under art. 28, the three-blast signal has no reference to any "course authorized or required by these rules," for the direction to reverse in art. 23 is not compulsory, as it is preceded by the words "if necessary." The question is one of good seamanship, and the distinction between rules establishing a regulation which, if infringed, entails the penalty contained in s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, and rules, such as arts. 27 and 29, not creating any regulation within the meaning of that section, is pointed out by Romer L.J. in *H.M.S. Sans Pareil.* (1) The decision in that case is binding on this Court, and the observations of the learned judge made in the course of it are inconsistent with *The Uskmoor.* (2) There was, therefore, no duty with reference to the three-blast signal which, if omitted, entailed a breach of the rules; and, in any event, if there was an infringement, it had, for the reasons given by the learned judge in the Court below, no possible effect on the collision.

Aspinall, K.C., in reply. There is no conflict between the observations of Romer L.J. in *H.M.S. Sans Pareil* (1) and those of Lord St. Helier in *The Uskmoor* (2), for, in the former case, Romer L.J. was not dealing with art. 28. His remarks were limited to arts. 27 and 29. The word "required" in art. 28 points to such matters as are incumbent upon the navigator to do under the rules, as, for example, if in a certain position he is to port, and he is to indicate that course by one short blast; but the rules recognize that circumstances may require that other steps shall be taken without its being possible to state beforehand what the particular steps shall be. These will be

(1) [1900] P. 267, at pp. 290, 291. (2) [1902] P. 250.

"authorized" courses, and it is particularly necessary in such cases that the course taken shall be indicated to the other vessel in sight by the appropriate signal, as, for example, three short blasts when putting the engines full speed astern.

LORD ALVERSTONE C.J. In this case a number of points have unexpectedly arisen, and if I had felt any doubt I should certainly have taken further time to consider them; but, if any such rule is to be laid down as suggested by counsel for the respondents or any such decision is to be given, it must be by a higher tribunal, if not by the Legislature, for in my opinion the course of practice is far too clearly established to justify us in giving effect to the argument on behalf of the respondents on the question of law.

It has been argued that the Regulations for Preventing Collisions at Sea do not apply at all to this river, and that, if the opening words of the Order in Council are to be given their natural meaning, the application of the rules to the navigation of the river would be ultra vires. I have not had an opportunity of ascertaining whether those words were in the earlier regulations, but these are of such long-standing that it is not material. If there has been an alteration that would perhaps tell rather more in favour of the view I am expressing. According to the opening words of Schedule I. of the Order in Council, these rules are to be followed "by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels"; and, as I pointed out when the question was first indicated to us, art. 30, which is correlative to the preliminary article, provides that "nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." It is impossible to read those words without coming to the conclusion that the opening words were intended to include harbours, rivers, or inland waters, because those are the waters as to which it is contemplated local rules may override general rules. In those circumstances, it seems to me impossible to give the narrower construction or to say that these rules are not applicable to such a river as that in which this

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collision took place, having regard to the express words of the regulations, unless we do it on the ground that they were ultra vires. Without going into history, the recognition which has been given to these rules by the greater number, if not all, of the civilized nations of the world, and the fact that they have been constantly applied to harbours, rivers, and inland waters of various kinds, to my mind make it quite impossible for us at the present day to give effect to such an argument as has been addressed to us; and I think we should be upsetting the practice that has been acted upon over and over again. This is not my opinion only, because when dealing with the matter in the case of *The Carlotta* (1) it was pointed out that from the year 1866, in the case of *The Concordia* (2) and many other cases, the regulations were treated as being applicable to the river Thames; and the ground upon which, in *The Hare* (3), the Manchester Ship Canal was excluded certainly does not in any way shew that the President thought any doubt was to be thrown upon the applicability of the rules to such a place as that in which this collision occurred. That being so, it seems to me that the way in which this case was fought in the Court below is the right way in which it has to be dealt with, that is to say, whether or not there has been an infringement of the navigation rules and whether or not the learned judge has come to a right conclusion upon that part of the case in thinking that that infringement could have had no possible effect upon the collision.

Upon that particular part of the case another point of law has been taken. It is said that at any rate as to a part of the blame attempted to be thrown upon the *Anselm*—that is to say, not sounding three blasts to indicate that she was going astern with her engines—the neglect to give that signal has not the consequences that neglect to obey a particular direction involves. That argument is based upon the proper construction to be given to the word "authorized" in the article which refers to the signals. That article is the 28th, and is as follows: "When vessels are in sight of one another, a steam vessel under way, in taking any

(1) [1899] P. 223. (2) (1866) L. R. 1 A. & E. 93.
(3) [1904] P. 331.

course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren." During the argument I pointed out that the word "course" there could not mean compass course only, because it is quite plain that helm directions and engine directions are meant to indicate the movements of the vessel for the purpose of avoiding collision or to put an end to any condition of danger existing. Upon the question of the construction of the word "authorized" we have had cited to us the decision of a very distinguished and experienced judge, Lord St. Helier, when President of the Admiralty Division. He, in *The Uskmoor* (1), has given a construction of the word "authorized" which certainly commends itself to me, and which, I think, it is very desirable to uphold, for the reason that it is so extremely necessary that if any course is being taken which is not absolutely required, but is a course which is "authorized" and therefore permitted, notice should be given to the other ship as to the manœuvre that is being undertaken. I only read, in order to adopt it, the passage from Lord St. Helier's judgment read by counsel for both the appellants and respondents. It is as follows: "The rule does not apply where a vessel, in conducting manœuvres in the ordinary course of navigation quite apart from seeing any other vessel, thinks it right to port or starboard her helm; but the rule is also limited to 'taking any course authorized or required by these rules.'"—That observation, with which I entirely agree, is to shew that these words, as I have more than once pointed out, are used with reference to vessels approaching so as to involve risk of collision, or which may be so approaching.—"It has been sought to put a rather narrow interpretation upon the rule. Of course the word 'required' is clear enough. There are certain things required by the rules to be done. The word 'authorized' is, however, very much larger, and I am inclined to think that a large interpretation ought to be given to it, and that it includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight, although it is quite true that there are certain cases where you may say a more distinct authorization arises. For instance, an overtaking

(1) [1902] P. 250, at p. 253.

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vessel, which has to keep out of the way of the overtaken vessel, would be authorized in going to port or starboard, according as the circumstances of the case might require, and, under the crossing rule, the vessel which has to keep out of the way must be considered authorized to do so by one of several means, as the case may seem to require."

I pointed out, during the argument on behalf of the respondents, that if you took a number of rules, beginning with the 18th and ending with the 22nd, you found that when one steamship is directed to keep her course and speed the other vessel, which is directed to keep out of the way, shall, if the circumstances of the case, admit, avoid crossing ahead of the other. That seems to me to include both requirements and authority, because, although the ship is told she must avoid crossing ahead, she may do so by taking sometimes one manœuvre and sometimes another. With regard to all these arguments, I have already pointed out that it is very desirable the other vessel should know what is being done, and I call attention to the last of the sound signals, given in art. 28, namely, "Three short blasts to mean, 'my engines are going full speed astern.'" That is only one of the manœuvres that may be taken by the engines of a ship, and yet that particular signal is indicated as one of which notice is to be given if the vessel is taking a course authorized or required by the rules. It is very difficult to see that there is any direct requirement to stop and reverse at all, because counsel for the respondents pointed out that art. 23, which deals with stopping and reversing, says, "if necessary." Therefore it seems to me that the "authorized" mentioned in art. 28 at least includes the case of stopping and reversing the engines where a vessel does so, not being bound to do it for the purpose of avoiding risk of collision. Then it is said that this view is inconsistent with the judgment of Romer L.J. in *The Sans Pareil* (1), and that where it is inconsistent we must follow that case. I do not understand Romer L.J. to have said anything inconsistent with *The Uskmoor*. (2) He was pointing out that a vessel which was guilty of bad seamanship, and therefore fell within the blame indicated by rr. 27 and 29, did not of necessity infringe

(1) [1900] P. 267. (2) [1902] P. 250.

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the rules within the meaning of the section under which vessels shall be held to blame and be deemed to be in fault. He was not in any way putting any construction upon "authorized or required" in art. 28. It seems to me that the two judgments can well stand together, the one indicating that bad seamanship—or that which would be held to be bad seamanship—need not of necessity be a breach of a statutory rule, the other deciding that what you are authorized or required to do under the rules may impose upon you an obligation to give a sound signal. I think the two decisions were dealing with entirely different subject matter, and I do not read or find anything in the judgment of Romer L.J. which conflicts with the opinion of Lord St. Helier in *The Uskmoor* (1), which, as far as I am entitled to do in this Court, I wish to adopt for my own.

I now have only to deal with the particular heads of blame, and the view of the learned judge that the infringement of the rules, to adopt his own words, "had no possible effect on the collision." I am unable to accept that view, and I think it would be best to indicate why it seems to me, with great deference to Bargrave Deane J., that there was blame upon the *Anselm* in fact before I deal very briefly with the question whether or not the *Anselm* satisfied the Court that the breach of the regulations had no possible effect upon the collision. I think that from the general seamanship point of view there are three matters in which the *Anselm* is distinctly to blame. In the first place, it seems to me that having the *Cyril* upon her port bow, and seeing the *Cyril* starboarding, and she continuing her port helm, it was certainly right for her and necessary for her to indicate what she was doing to the *Cyril*, I might say almost apart from the rules, but I will take it for the purpose of my judgment that in that particular respect she was disobeying the rules. What are the facts? Here is another vessel being navigated down, and the two vessels are meeting at a combined speed of twenty-two to twenty-three knots, which is a mile in less than three minutes. The *Cyril* starboards at a distance at which she must be likely to interfere with the course of the *Anselm* up the river. It seems almost impossible that that

(1) [1902] P. 250.

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could have been done by a steamer which was end on, as everybody agrees both steamers were, and which had a proper look-out; and, it being her duty, as undoubtedly it was, to port, it is quite impossible to say that the omission of the *Anselm* to signal that she was porting her helm had no effect upon this collision.

Then there is the non-signalling that she was reversing. We are advised by our nautical assessors, who have also advised us with regard to the port helm signal, that the non-indicating to this vessel which was rapidly approaching that the *Anselm* was reversing her engines was abstaining from giving her information which might be useful, if only for the purpose of calling her marked attention to what was going on in front of her. That seems to me the essence and pith and marrow of the rule which indicates that these signals are to be given. Then for a substantial time the *Anselm* neglects to reverse her engines. I have already said the vessels were approaching at a combined speed of twenty-two or twenty-three knots. The *Anselm* sees a mile or a little over a mile off a vessel coming down starboarding her helm, and it seems to me elementary that at that time there was serious risk of collision, and it was the duty of the *Anselm* to take her way off as soon as she possibly could, and so to have avoided, or, at any rate, reduced the danger of collision.

I therefore come to the conclusion that the *Anselm* was to blame in these three respects, and that as regards two of them, namely, neglect to give sound signals when porting and when reversing, it is quite impossible to come to the conclusion that they had no effect upon the collision. I have only one other observation to make, which is of a general character, and applies to this case. The case is a peculiar one. Both ships belong to the same owners. The judgment of Bargrave Deane J. proceeds, to a large extent, as I think was pointed out by Fletcher Moulton L.J., upon what would be the effect on those on board the *Cyril*. Where persons are attacked, and it is proved against them that there is a serious breach of statutory rules, I have very grave doubt whether they can be said to fulfil the obligations upon them if they do not satisfy the Court by affirmative evidence that the breach of the rules has no possible effect. See *The*

Fanny M. Carvill. (1) I cannot believe that where both vessels belong to the same owners it was sufficient for the defendants to prove what was done on board the *Anselm* and leave the Court to draw the inference that, in the absence of those signals, what was done on the *Anselm* was understood on the *Cyril.*

I think, therefore, that the *Anselm* was to blame in the respects I have indicated, and I further think that it is quite impossible to come to the conclusion that the breach of the regulations had no possible effect upon this collision. This appeal must, therefore, be allowed, and the *Anselm* also held to blame for the collision.

FLETCHER MOULTON L.J. I am of the same opinion, and only wish to add a few words upon one or two of the interesting points arising in this case.

First, with regard to the question whether these rules applied to such a place as that in which this collision occurred. It is, in my opinion, clear that it is a place within the description to be found in the preamble to the regulations, and I can see no reason for saying that it was ultra vires to make the regulations apply so widely. In deciding thus we are not going away from the decisions in *The Carlotta* (2) and *The Hare.* (3) The latter was a case of collision in the Manchester Ship Canal, and in the course of his judgment the President said: "I do not read that preliminary article as intended to extend the word 'sea' beyond its proper meaning, and my view on this subject has already been expressed in the case of *The Carlotta.*" (2) When we turn to his judgment in *The Carlotta* (2) to find his view as to the meaning of the word "sea," we find he says that the sea regulations are intended to apply to tidal waters connected with the high seas navigable by sea-going vessels. Within that definition of the "sea" the place where this collision took place undoubtedly comes.

The next point is the question whether the *Anselm* was,

(1) 13 App. Cas. 455, n. (2) [1899] P. 223, at p. 226.
(3) [1904] P. 331, at p. 336.

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immediately before the collision, taking a course "authorized or required" by the rules, so as to come under the obligation to give a single blast when she ported her helm and three blasts when she reversed her engines. I think that the word "authorized" there used is well chosen, and that it was adopted for the very purpose of including the full meaning given to it in *The Uskmoor*. (1) I am satisfied that each one of the able counsel I see before me, if he had to argue the case of a vessel which had under art. 27 departed from the strict directions of some other of the regulations because it was necessary so to do in order to avoid immediate danger, would say that she was taking a course "authorized" by the regulations. The phrase that one would naturally use in such a case would be that the ship had the "authority of the regulations" in so doing. Therefore I think art. 28 was intended to apply to such a case as this. I may add that it is to my mind far more important that these signals should be given when the course taken is not the ordinary one prescribed by the regulations, but is the result of a deduction from the principles that underlie them, and from the dictates of good seamanship, that is to say, a course which has to be taken at the moment by the individual under the particular circumstances of the case, and which is justified only by their special character and the imminent danger that has arisen. In my opinion the law laid down in the case of *The Uskmoor* (1) is sound, and it is extremely important for the good management of ships that it should be recognized and applied.

The next point is whether the *Anselm* was to blame for not reversing her engines sooner. These vessels were navigating a narrow channel in opposite directions. They were both swift vessels, and their combined speed must have amounted to between twenty-two and twenty-three knots, and they were intending to pass at full speed. I do not suggest that there was any negligence in so doing as long as both vessels observed the regulations strictly; but the moment that the one vessel saw that the other was departing from the rules the danger of attempting to pass at full speed was manifest, and the

(1) [1902] P. 250.

responsibility of persisting in doing so was instantly thrown upon her; and in such circumstances as we have before us to-day it was obligatory upon the *Anselm* at once to reverse her engines so as to lessen as far as possible the speed of approach. The vessels were somewhat more than one and a half miles apart when this occurred, and had the speed of the *Anselm* been thus checked, I am satisfied that the collision could have been averted.

The last point upon which I wish to touch is the failure to give three blasts. It is suggested that this signal was not necessary, and that it would have made no difference if it had been given. It appears to me that had the *Cyril* heard three blasts given by the approaching vessel—that is to say, had learnt that a vessel coming towards her in broad daylight and in smooth water had suddenly felt herself bound to reverse her engines and go hard astern—it would have forced itself upon the mind of everybody on the *Cyril* that the consequences of the starboarding by the *Cyril* had been to bring the two vessels into a position of difficulty and danger. For what other reason could a vessel in the circumstances of the *Anselm* suddenly deem it necessary to go astern as hard as she could? No signal which I can imagine would have conveyed a more powerful warning to the people on board the *Cyril* to look to what was happening and to take proper measures to prevent a collision. For this reason I think it was a grave error not to have given the three blasts, and that the omission to give that signal probably contributed to the collision. For the reasons given by the Lord Chief Justice, I pay little heed to the suggestions made by counsel as to possible explanations of the behaviour of the *Cyril*, with a view to exculpate her. When we have a case before us in which the defendants are people in the possession of evidence which could have explained what passed on board the *Cyril* just as perfectly as they could explain what passed on the *Anselm*, and they leave the Court entirely without evidence as to it, the Court is entitled to draw its own conclusions as to whether this omission might possibly be connected with the collision as a contributory cause. The defendants have not shewn that it was impossible that it should have

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contributed to the collision, so that we are bound to hold that for this reason also the *Anselm* was to blame.

Appeal allowed with costs, but no costs in the Court below.

Solicitors for appellants (plaintiffs), owners of cargo on board the *Cyril : Waltons, Johnson, Bubb & Whatton.*

Solicitors for respondents (defendants), owners of the *Anselm : Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

T. L. M.

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[IN THE COURT OF APPEAL.]

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Admiralty—Collision—"Not under Command"—"Aground"—"Authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, 1897, *arts.* 4, 11, 28.

Just before sunrise, but in daylight, and in the shallow water of Monte Video Roads, the plaintiffs' and the defendants' steamships were, at the material time, crossing vessels within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea. The plaintiffs' vessel, was pursuing a southerly course at about three knots, and had the defendants' vessel on her starboard bow at about right angles. As the giving way vessel, the plaintiffs' vessel ported to pass under the stern of the defendants' vessel, but struck her on the port quarter, and was held to blame for not taking sufficient or timely steps to avoid collision.

The defendants' vessel, of deeper draught, was slowly dragging through the mud on an easterly course at about one mile per hour, and to assist in her progress, she was, from time to time, putting her engines full speed astern, the last occasion being for the first three out of the eight minutes preceding the collision :—

Held by the majority of the Court of Appeal (Lord Alverstone C.J. and Kennedy L.J.), affirming the decision of Sir Gorell Barnes, President, that the defendants' vessel was free from blame, as she was not bound to exhibit two red lights under art. 4 or 11, being neither "not under command" nor "aground" within the meaning of those articles, nor was she under any obligation to give the three short blast signal on putting her engines full speed astern, as she was so manœuvring with her engines, from time to time, in the ordinary course of navigation to enable her to go ahead as fast as the condition of the mud would permit,

and was not, within the meaning of art. 28, taking a course "authorized or required by these rules," with reference to the other vessel in sight.

Held by Fletcher Moulton L.J., that the defendants' vessel was also to blame, as, at a material time, when the two vessels were in sight of one another within the meaning of art. 28, she failed, on putting her engines full speed astern, to give the prescribed sound signal, and it had not been proved that the infringement of the regulation could not by possibility have contributed to the collision.

Per Fletcher Moulton L.J.: *Quære* whether the "departure from the above rules" authorized by art. 27 has any application to the imperative directions contained in art. 28.

APPEAL by plaintiffs, the owners of the steamship *Canning*, in an action of damage by collision, against a decision of Sir Gorell Barnes, President, in favour of the defendants and counter-claimants, the owners of the steamship *Bellanoch*.

The case is reported on the main question raised, viz., whether the direction in art. 28 of the Regulations for Preventing Collisions at Sea, 1897 (1), as to giving three short blasts on the whistle, applies to a steam vessel under way, which, owing to her heavy draught, is dragging through the mud, and therefore, from time to time, assisting her progress by moving her engines astern.

On December 24, 1905, about 4.45 A.M., a collision occurred in Monte Video Roads between the *Canning*—a steamship of 5366 tons gross, and 3459 tons net, register, with engines of 3500 horse-power indicated—and the *Bellanoch*, a screw steamship of 2637 tons gross, and 1647 tons net, register, belonging to Glasgow. The *Canning* was leaving Monte Video Harbour to proceed to Buenos Ayres, and when the defendants' vessel was first seen, the *Canning* was heading out of the harbour on a course, in a southerly direction down the dredged channel, to pass between the two black buoys, and was making from three

(1) Sound signals for vessels in sight of one another (art. 28):—

"The words 'short blast' used in this article shall mean a blast of about one second's duration.

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard.'

"Two short blasts to mean, 'I am directing my course to port.'

"Three short blasts to mean, 'My engines are going full speed astern.'"

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to four knots. The *Bellanoch* was bound from Monte Video to Antwerp, and, when the plaintiffs' vessel was first seen, she was proceeding under a port helm with engines working full speed ahead from her anchorage to the deep water channel, with her stern dragging through the mud, heading about E. ½ S. magnetic, and making about one knot. The weather was fine and clear and the wind north-easterly, light. The sun had not yet risen, but it was daylight, and the tide was about low water, with no appreciable current. At the material time the vessels were crossing, and the *Canning* was bound, under art. 19, to give way, which she failed sufficiently to do owing, it was alleged, to the action of the *Bellanoch*.

The case was tried on May 10 and July 2, 1906, and the circumstances attending the collision fully appear from the following judgment delivered in the Court below. By their pleadings the plaintiffs charged those on board the *Bellanoch* with failure to comply with the following articles of the Regulations for Preventing Collisions at Sea, viz., 4 (lights for a vessel "not under command"), 11 (lights for a vessel "aground"), 28 (sound signals), and 29 (proper precautions), whilst the defendants, as counter-claimants, charged those on board the *Canning* with neglect to comply with arts. 19 (crossing rule) and 23 (slackening speed), or to observe the preliminary to art. 17 of the same regulations.

SIR GORELL BARNES, President. The *Canning* was leaving Monte Video Harbour to proceed on her voyage to Buenos Ayres. She was drawing 19 ft. 11 in. forward, and 19 ft. 7 in. aft, so she was not quite so hampered by the shallow depth of water there as the other vessel, the *Bellanoch*, was. The case on the part of the *Canning* is, that the *Bellanoch* was heading across the channel, a channel which, I understand, is a dredged channel through the shallow water for the purpose of enabling deep-draughted vessels to leave the port, and it is said she was heading across the channel, in that way, some distance off, and that the *Canning* kept on down the channel until she passed certain buoys which mark it, and that then she ported her helm to pass astern of the *Bellanoch*, which, I ought to have said, was heading across the

channel to the eastward, and while she was swinging under her port helm the *Bellanoch* came astern and thus produced the collision, notwithstanding what the other vessel did to avoid it.

The defendants' vessel, the *Bellanoch*, was bound from Monte Video to Antwerp, and she had been hampered by the mud, I think, more or less to the westward of the extension, and was endeavouring to get to sea and to make her way into the channel, and her case is that she was proceeding, shortly before this collision happened, under a hard-aport helm with her engines working full speed ahead and her stern dragging in the mud, heading about E. by S. or E. ½ S., and that all the time that, it is said by the plaintiffs, she was going astern shortly before the collision, she was, in fact, going ahead and dragging slowly through the water.

The issue, therefore, is a very simple one to state, but perhaps it is not so easy to determine which story is true about this particular point. I notice that the defendants' vessel, the *Bellanoch*, was drawing 24 ft. 6 in. aft, and 20 ft. 4 in. forward, and had been endeavouring, obviously, from the evidence which was given in this case by her engineer, which is confirmed to-day by the master, to do what I have already stated, namely, move ahead from where she had been—I think she had been originally at anchor—with the object of getting to the eastward and so into deeper water. I do not propose to read the entries in the log-book, they all seem to me to go directly to the point, and, having regard to the evidence which I have heard on the previous occasion and to-day, I have no hesitation in coming to the conclusion, after seeing the witnesses, that it practically disposes of this case—it is a conclusion of fact, pure and simple—that the case of the plaintiffs is not made out, and that the case of the defendants is made out, that they were going ahead and were not going astern. This collision was not produced as the plaintiffs say. It may be perfectly true that, it is a remarkable thing that, the master of this large fine vessel—the *Canning*—did not port enough to clear the vessel which was in front of him and broadside on to him, and, according to my view, going very slowly ahead. The only possible explanation, which we meet with so frequently in this Court, is, that sometimes they shave things too .

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fine. I do not think that he allowed enough room, and, if I remember rightly, there was a suggestion made which has some weight with the Elder Brethren in this case, namely, that he did not port enough because, probably, the master of the *Canning* had not allowed enough room, having regard to the possibility of the current setting across his course, and therefore preventing him sufficiently clearing the stern of the *Bellanoch*.

This broad fact really disposes of the case—on the merits entirely,—but there are two or three, I think, in this case, I may say, highly technical points which are raised with considerable ingenuity by counsel for the plaintiffs, with the view, not of preventing their own ship from being found to blame, but with a view to also making the defendants' ship to blame, for they contend that the *Bellanoch* has committed a breach of art. 4 and art. 11 of the regulations, because they say art. 4 provides that "a vessel which, from any accident, is not under command," shall exhibit certain lights or certain shapes according as it is before or after sunrise, and that this vessel was, from some accident, "not under command." That seems to me to be a question partly of the construction of the article, and partly a question of fact. This vessel, according to the view the Elder Brethren take, was under command; she was moving, and capable of doing what she wanted to do, and had, in the course of three-quarters of an hour, moved three-quarters of a mile; she was only hampered by the fact that she was dragging through the mud. And then, again, it is not necessary in this case that I should say anything definite about it, but, at any rate, it seems to me doubtful whether she was "from any accident" not under command.

With regard to art. 11, the only part of that article which is material is the last sentence: "A vessel aground in or near a fairway shall carry the above light or lights and the two red lights prescribed by article 4." I am of opinion, as a matter of fact, that this does not apply to a vessel which is not aground, and that also is the view of the Elder Brethren.

According to my view of this case neither art. 4 nor art. 11 applies, and there is this broad answer to any technical points of this kind: that the witnesses from the plaintiffs' ship said that if there had been lights up they could not have seen them

because it was broad daylight, they might have seen the lanterns, and what they did see was the ship herself as plain as if the sun were up, and it was broad daylight, and they could see everything this ship was doing.

Therefore, although it is not necessary to go into it in this case, I cannot see that these articles have anything to do with the matter, or have anything in them which could by possibility affect the case in any way.

The last point is that, under art. 28, the *Bellanoch* ought to have given three short blasts with her whistle. The point is connected with the possible suggestion that she was not keeping her course and speed. I think under the circumstances she was doing that; she was doing all she could to keep her course and speed in compliance with the provisions of the appropriate article; that she was going ahead as fast as ever she could, but reversing at times, not with the object of going astern; her whole object was to get ahead, to get into deeper water and to go ahead; what she was reversing for, according to her master, was to clear her propeller, and assist to get the vessel to answer her helm. If that was relied on, though I hardly think it was suggested, there is practically nothing in it; and it was not a breach of the article which required her to keep her course and speed. But it is said that on the two or three occasions on which she reversed with the object indicated she did not give three short blasts, and she therefore committed a breach of art. 28. Here again it is a highly technical point, and quite against any merits when once the decision is arrived at that the vessel did not go astern, or even if it could be said that there was a breach of the article unless there were something to qualify it, it would have had, as a matter of common sense, another article to control it, and that article is this, art. 27: "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." What would have happened if she had indicated by her whistle—three short blasts—that she was going astern? She would have invited the other vessel to go ahead of her, and that might have misled the other vessel most completely if, after

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that, she had tried to keep her course and speed and go ahead, and the other vessel had said, "You gave three short blasts that you were going astern," then the *Bellanoch* would have been in very considerable difficulty. The answer is, that using the signal in this particular way in these particular circumstances would have been most misleading, and when the other vessel could see everything that was being done, there is really nothing in that point which has any weight at all, and I venture to say there is no force in the technical points throughout.

The result is that this case must be determined by holding that the *Canning* is alone to blame for this collision.

On appeal:—

Aspinall, K.C., Horridge, K.C., and *A. D. Bateson*, for the appellants (plaintiffs), the owners of the *Canning*. The *Bellanoch* was alone to blame, or, at least, she was jointly to blame, for she came astern and failed to give the appropriate signal, that is to say, those in charge did not take proper steps to warn those in charge of the *Canning* as to what they were doing. According to the evidence, the *Bellanoch*, being off the breakwater, started to raise her anchor about an hour before the collision, which occurred at 4.45, that is, some minutes before sunrise, which was at 4.51, so that the rules as to lights applied. She was drawing 20 ft. 4 in. forward, and 24 ft. 6 in. aft, that is to say, she was 4 ft. 2 in. by the stern, and as there were only 22 ft. 6 in. of water, she was afloat forward, but dragging in the mud aft, and could not be navigated at more than a mile an hour. She was, therefore, "not under command," and it was her duty under art. 4, as construed in *The P. Caland* (1), to have exhibited two red lights.

Again, according to the evidence of the helmsman of the *Bellanoch*, the master of the *Canning* "sang out to us, 'Why don't you go ahead?' Our captain answered him, 'I am going ahead all I can. I am on the ground.'" Under those circumstances, it was also the duty of the *Bellanoch*, under art. 11, to have exhibited "the two red lights prescribed by article 4."

It is also clear from the deck log that at the material time,

(1) [1893] A. C. 207.

that is, between 4.20 and 4.45, the *Bellanoch* was going full speed astern for thirteen minutes out of the twenty-five. The terms of art. 28 are imperative in requiring a steam vessel, under way, in sight of another vessel, and taking a course authorized or required by the rules—*The Uskmoor* (1)—with her engines going full speed astern, to indicate to that other vessel what she is doing by giving three short blasts on her whistle, and this would have to be done whether those in charge were obeying art. 21 by keeping their course and speed, or disobeying that article under the special circumstances referred to in arts. 27 and 29.

The failure to give that warning was the cause of the collision, for the *Canning* has been, in effect, held to blame for not giving the *Bellanoch* a wider berth; but if the *Canning* had had proper notice under the rules that, whether or not the *Bellanoch* was, in fact, going astern, her engines were going astern, and, therefore, stopping her way, so that she was not going ahead, those in charge of the *Canning* would have ported earlier and reduced speed.

[They were stopped by the Court.]

Arthur Cohen, K.C., Laing, K.C., and *C. R. Dunlop*, for the respondents (defendants), the owners of the *Bellanoch*. The regulations are for the purpose of preventing collisions at sea, and, therefore, the provision as to exhibiting two red lights, contained in art. 4, has no application to this case, for the *Bellanoch* was only pursuing the regular practice in this locality of, from time to time, without reference to other vessels, putting her engines astern in order, as her master said, to clear her propeller of the mud, which, being a vessel of deep draught, she would necessarily stir up, and which would of necessity render her progress slow. Art. 11 also has no application, as the vessel was not "aground" within the meaning of that article.

Art. 28 applies to a vessel taking a course authorized or required by the rules for the purpose of avoiding collision; but the *Bellanoch* was proceeding in the ordinary course of navigation, without reference to other vessels, and was moving slowly ahead as fast as the condition of the mud would admit, so that those in charge of her did not violate any rule by not giving the

(1) [1902] P. 250.

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three-blast signal, independently of the fact that for five minutes prior to the collision, and at the time of the collision, the engines of the *Bellanoch* were not going full speed astern, so that a three-blast signal would have been incorrect under the article.

Assuming that, in accordance with the decision in *The Uskmoor* (1), the direction in art. 28, as to giving the specified signals, is not only imperative, but refers to any course which, for the safety of the vessels, good seamanship requires to be taken in respect of the other vessel in sight, still that case has no application, for the *Bellanoch* was not when the other vessel was in sight, and with reference to that other vessel, taking a course "authorized or required" by the rules: see *The Mourne*. (2)

The question is purely one of fact, and, according to the deck log, the engines were worked ahead and astern to try to get into deeper water. The collision occurred at 4.45, and for five minutes previously, that is, from 4.40, the same deck log shews that the engines were going "full ahead." The collision was caused by those in charge of the *Canning* porting too late, in other words, cutting it too fine.

Horridge, K.C., in reply. There was a distinct breach of art. 28 on the part of those in charge of the *Bellanoch*, for they saw the *Canning* and knew that it was the duty of that vessel to keep out of the way. They were, therefore, bound to let the *Canning* know what they were doing, and if they were altering their speed, as they in fact were, those in charge of the *Canning* should have been warned by whistle, so that they might take the necessary steps in time to avoid risk of collision. It cannot be said that the absence of the three-blast signal could not by any possibility have contributed to the collision: *The Fanny M. Carvill* (3); *The Duke of Buccleuch*. (4)

Cur. adv. vult.

March 18. LORD ALVERSTONE C.J. This is an appeal in a case of collision which occurred in the Bay of Monte Video a few minutes before sunrise on December 24, 1905, between the

(1) [1902] P. 250.
(2) [1901] P. 68.
(3) (1875) 13 App. Cas. 455, n.
(4) [1891] A. C. 310.

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Bellanoch and the *Canning*. The *Canning*, which had been at anchor north of the breakwater, had rounded under her port helm and passed down, just outside the breakwater, making a straight course about S. by W. to the two buoys which are to the southward of the breakwater at a distance of about half a mile. The *Bellanoch*, a large vessel belonging to Lamport and Holt, had been at anchor about three-quarters of a mile to one mile to the westward of the buoys, and was, just before the collision, proceeding on a course about E. $\frac{1}{2}$ S., roughly speaking at right angles to the course of the *Canning* down the channel. The *Canning* continued her course straight down to the buoys, and, after passing between them, ported her helm with a view to pass under the stern of the *Bellanoch*, which was still heading to the eastward, the *Canning* being at that time at a distance of about a quarter of a mile from the *Bellanoch;* and her case was that, on seeing that the *Bellanoch* was coming astern, the *Canning's* engines were reversed full speed, her helm being kept hard a-port. The collision happened by the stem of the *Canning* hitting the port side of the *Bellanoch* about forty feet forward of her stern.

Under these circumstances the President found the *Canning* alone to blame, and, as regards the manœuvres of the *Canning*, I am clearly of opinion that she was to blame, on the ground that she ported too late, and maintained her speed far too long, not having room to clear the *Bellanoch* under her hard a-port helm at the rate of speed the *Canning* was going.

The real difficulty of the case arises with regard to the manœuvres of the *Bellanoch*. Her case was that, drawing 20 ft. 4 in. forward and 24 ft. 6 in. aft, she had been dragging through the mud at a speed over the ground of about three-quarters of a mile to a mile an hour; that she had moved her engines ahead and astern, going astern to clear her propeller out of the mud. The collision happened, according to the time of both ships, at 4.45. The movements of the engines of the *Bellanoch*, according to her deck log and the log kept by the engineer, were as follows:—3.54 A.M., full speed ahead on engines; 4.20, full astern; 4.24, full ahead; 4.28, full astern; 4.34, full ahead; 4.36, stopped; 4.37, full astern; 4.40, full ahead.

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It will be noted that during the seventeen minutes immediately preceding the collision—that is to say, from 4.28 to 4.45—her engines went full speed astern twice, namely, for a period of six minutes from 4.28 to 4.34, and for a period of three minutes from 4.37 to 4.40. It was admitted that she gave no signal by whistle that her engines were going full speed astern, in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, and it was strenuously contended, on behalf of the *Canning*, that her neglect to give these signals was a breach of art. 28, and that the *Bellanoch* had not proved that such a breach could not possibly have affected the collision. The learned President decided this point in favour of the *Bellanoch*, and went further, holding that to have given the signal might have misled the *Canning*.

The case is, in my opinion, by no means free from difficulty, but before deciding as to the application of the rules to the circumstances of the case it is, in my judgment, necessary to determine clearly at what point in the navigation of these two vessels they became liable to obey the rules, or when, in other words, they were approaching so as to involve risk of collision. From the time the *Canning* cleared the breakwater—a distance of about three-quarters of a mile from the place of collision—and was heading her course down towards the buoys, she had the *Bellanoch* slightly on her starboard bow, the *Bellanoch* moving very slowly ahead towards the eastward. If it is to be taken, for the purpose of considering the duties of the two ships, that they were then approaching so as to involve risk of collision, it would be difficult to hold that the *Bellanoch* did not commit a breach of the rules in neglecting to blow her whistle so as to indicate that her engines were going astern on the two occasions already mentioned. It is to be remembered, however, that the course of the *Canning*, as directed by the river pilot, was down the dredged channel to the two buoys, and that until she reached the buoys she would not, in the ordinary course, manœuvre to avoid ships to the south of them; and we are advised by our nautical assessors that the necessity for action on the *Canning's* part did not arise until the *Canning* was approaching the buoys, and that there was no difficulty after passing the buoys in her

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manœuvring to keep out of the way of the *Bellanoch*. When reaching the buoys it is quite clear that it was the duty of the *Canning* to port and go under the stern of the *Bellanoch*, and it was the duty of the *Bellanoch* to keep her course; this follows from arts. 19, 21, and 22. There was, therefore, in my opinion no obligation upon the *Bellanoch* to sound her whistle, indicating that she was going astern, during the time that the *Canning* was coming down from the breakwater, until she got in proximity to the buoys. The action of the *Bellanoch* in going astern, at the periods mentioned in the log, was action taken by her not in consequence of the approach of the *Canning*, but in the ordinary course of her navigation so as to enable her to go ahead upon her eastern course as fast as the condition of the mud would permit her. The speed of the *Canning* when she approached the buoys was put by her preliminary act at three knots, and by her master at from four and a half to five, reduced to three at the time of the collision.

In my opinion it is not unfavourable to the *Canning* to assume that, at the time she passed between the buoys, her speed was about four knots. This would give a mile in fifteen minutes, or a quarter of a mile in just under four minutes. The speed of the *Bellanoch* does not affect the question of time, as her course was at right angles to the course of the *Canning*. Now, there is no dispute as to the time of the collision; it is fixed by both vessels at 4.45. According to the story of the *Bellanoch*, which the President has believed, her engines were going ahead for five minutes before the collision, and I therefore come to the same conclusion as that at which the President has arrived, that her engines were not put full speed astern at any period when she was bound to control her actions in consequence of the approach of the *Canning*. It is true that art. 28 refers to the signals being given when vessels are in sight of one another, but the words immediately following, "in taking any course authorized or required by these rules," shew that it does not mean in sight at any distance, but in sight with reference to the manœuvres which a vessel is authorized or required to take, having regard to the other vessel approaching, for the purpose of avoiding collision. I have been unable to see how it can be successfully contended

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that the reversing from 4.37 to 4.40 can be said to be "a course"—we pointed out in *The Anselm* (1) that "course" does not mean course by compass, but the action of the vessel—"authorized or required by the rules." In this respect the case differs entirely from *The Anselm* (1), decided by Moulton L.J. and myself a few days ago, in respect of a collision in the Para estuary, where the manœuvres in respect of which the *Anselm* neglected to give proper sound signals were taken with reference to, and in order to avoid collision with, the other ship, the *Cyril*.

It was attempted to be argued by counsel for the appellants that the going astern of the *Bellanoch* would stop her way to a greater or less extent, and therefore involve a breach by her of art. 21, which required her to keep her course and speed. This was not pleaded, and, as pointed out by the President, was hardly suggested in the Court below; but, in my judgment, the answer is the same as that which I have given to the earlier part of the case. I think that any retardation of her speed prior to 4.40 was in the ordinary course of her navigation and not when she was bound to act with reference to the *Canning*, whose duty it was to keep out of her way.

I am therefore of opinion that even if there had been a breach of the rule on the part of the *Bellanoch* in not sounding her whistle, it would be a purely technical objection, and that it had no possible effect on the collision. The master of the *Canning* admitted that he saw what the *Bellanoch* was doing all the time, and he alleged that the collision was occasioned by the *Bellanoch* coming astern through the water, a case which has been entirely disbelieved by the learned President.

I ought to add that it was at first contended that, under the circumstances, the *Bellanoch* was a vessel out of command or aground and ought to have shewn the signals prescribed by articles 4 and 11 of the rules. The learned President considered that the *Bellanoch* was not in a condition which required her to shew those signals, and I agree with him. For these reasons I am of opinion that the appeal should be dismissed.

FLETCHER MOULTON L.J. I regret that I cannot come to the same conclusion.

(1) Ante, p. 151.

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This is an action brought by the owners of the steamship *Canning* against the owners of the steamship *Bellanoch* for the damage sustained in a collision between the two vessels on December 24, 1905, a short distance outside the harbour of Monte Video. The plaintiffs in their statement of claim throw the blame on the defendants' ship, and there is the usual defence and counter-claim in which the defendants throw the blame on the plaintiffs' ship. The Court below has held the plaintiffs' ship alone to blame, and from this decision the present appeal is brought.

To a great extent the circumstances under which the collision occurred are not in dispute. The place of the collision was a point about three-quarters of a mile outside the breakwater which defines the inner harbour of Monte Video, and almost in the line of the dredged channel which stretches from the breakwater towards the sea. It is admitted on both sides that it was practically daylight, although the sun had not actually risen. It is agreed that there was no tide, and only a light north-easterly breeze, which it is not pretended had anything to do with the events that happened. The *Canning* (which drew 19 ft. 11 in. forward, and 19 ft. 7 in. aft) had lain in the inner harbour that night, and on leaving her moorings proceeded on the line of the dredged channel so as, in accordance with the direction of the pilot, to pass between two buoys lying at a distance of about half a mile from the breakwater, which mark the line of that channel. The direction of her course was substantially due south. From the time that she came to the breakwater, where she landed her river pilot, she could see the *Bellanoch* slightly on her starboard bow. There is some dispute about the actual speed at which she was going, the plaintiffs' master putting the maximum at five knots and the defendants' evidence at somewhat over that.

The *Bellanoch* had been anchored overnight in the bay to the south-west of the inner harbour, and some three-quarters of an hour before the collision occurred she had started in a direction substantially to the east, and thus at right angles to the course taken by the *Canning*. She drew 20 ft. 4 in. forward and 24 ft. 6 in. aft, which was greater than the depth of water in

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that part of the bay, so that she was dragging through the mud all the time, the entry in the ship's log being "ship dragging heavily in mud and moving very slowly." According to the evidence of the master the actual rate at which she was going was about a mile an hour—it certainly could not have been more—and I think that we may safely take it that in the three-quarters of an hour before the collision she had made about three-quarters of a mile headway. But it is evident from the log of the *Bellanoch* that this ground was covered at a very unequal rate. Her engines were going full speed ahead from 3.54 to 4.20, but from 4.20 to the time of the accident they were going ahead and astern alternately at short intervals. What she was doing is shewn clearly by the evidence, and the nautical assessors inform us that they have no doubt on this point. She was dragging so heavily that she was from time to time brought to rest, whereupon she reversed her engines, went astern for a period over the channel which she had just cut for herself, and then started forward again, gaining velocity as she did so, and charged into the mud before her with the impetus thus obtained. By this process of "tilting at" the mud she slowly made progress; but her actual rate of advance at this time must have been much less than the average of a mile an hour above referred to. In fact, her manœuvres were exactly those of a railway snow plough in clearing away heavy snow drifts, and could not be better described than in the cross-examination of the defendants' helmsman by the leading counsel for the appellants:—Q. But you see as you came along in the mud; I suppose you had made a channel for yourself through the mud; when you went astern with your engines the ship herself went back fairly easily, did it not? A. Yes.—Q. And then you got a start, and came full speed ahead at the mud in front of you? A. Yes.—Q. And then the mud in front of you stopped you again after a time; it brought you up stationary, did it not? A. Yes, that is right.—Q. That was why, was not it, you took such a long time to travel this half mile? A. Yes, we were dragging through the mud slowly all the time.—Q. After this ship was in sight of you were your engines ever put full speed astern? A. Yes.—Q. Once, or more than once? A. More than once.—Q. How many times do you say? A. About three times; I think so.

The log shews that the helmsman was entirely accurate in this evidence. It states that at 4.20 the *Bellanoch* went full astern for four minutes, then, at 4.24 full ahead for four minutes, at 4.28 full astern for six minutes, at 4.34 full ahead for two minutes, at 4.36 stopped for a minute, then, at 4.37 full astern for three minutes, and at 4.40 full ahead until the mud stopped her, which was shortly before the collision, the time of which is given at 4.45.

Under these circumstances the *Canning*, after going between the buoys, had the *Bellanoch* slightly on her starboard bow. It was her duty to go astern of her, and accordingly she ported her helm. There is substantially no contest so far, but here the divergence of the evidence commences. The master of the *Canning* says that he hard-a-ported from the first, and that when he did so he had plenty of room to alter his course sufficiently to pass astern of the *Bellanoch*, but that the *Bellanoch* went astern, and that consequently the *Canning* was unable to clear her and struck her on the port side some forty or fifty feet from the stern. The master of the *Bellanoch* says that his ship was passing about three hundred yards from the buoys, and that the *Canning* left her porting too late, and that she ought to have ported before arriving at the buoys; and he denies that his ship went astern after the *Canning* had ported. It is common ground, however, that the master of the *Canning* hailed him to go ahead as the ships approached. The master of the *Canning* says that the reply was, "I cannot go ahead. I am on the ground." The master of the *Bellanoch* says that his reply was, "I am going ahead all I can. I can do no more. My ship is on the ground." There is not much difference between the two versions, and as it is clear that the original statement of the helmsman of the *Bellanoch*, who heard it all, agreed with the evidence of the master of the *Canning* with regard to it, I think it is probable that the version given by the master of the *Canning* is the more correct; but it is not necessary to decide this.

At the trial the President disbelieved the case made on behalf of the plaintiffs to the effect that the *Bellanoch* was going astern at the time of the collision. With this finding, which largely depended on oral testimony, (and, therefore, on the demeanour

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of the witnesses), we cannot interfere. The *Canning* therefore has no excuse for not clearing the *Bellanoch*. She either ported too late or did not port sufficiently, and she must be held to blame. It may, no doubt, be said on her behalf, that although she was aware that the *Bellanoch* was only moving very slowly she did not know until too late that the *Bellanoch* was liable to stop. It is quite possible that the *Bellanoch* was, in fact, stationary, or almost stationary, during the critical minute or two immediately before the collision actually occurred, and that had she been moving, even at the average rate of progress which she had been making, she would have advanced the very short distance necessary to save the collision. But this is no defence for the *Canning's* action. Even if the collision had not occurred the master of the *Canning* would have been to blame for cutting it so fine. There was no excuse for so doing, and I therefore agree with the finding that the plaintiffs' vessel was to blame.

There is, however, a further question as to whether the defendant vessel was not also to blame, and on this point I regret that I find myself compelled to differ from the President of the Court below, and, I fear, from my brethren here also. I have, however, a decided view upon the question, and as the points raised by the judgment seem to me to be of grave public importance, and as it may be that the case will go higher, I feel bound to give my reasons.

I have already described the movements of the *Bellanoch* as taken from her own log. It seems to me to be impossible to contest the proposition that these two vessels were, throughout the whole of the time from the *Canning* leaving the harbour until the collision, under circumstances where the Regulations for Preventing Collisions at Sea were applicable to them. During the whole of this period they must have been well within a mile of one another and taking courses which crossed at right angles, the distances being such that the vessels would probably meet at the point of intersection. I doubt if, at any time after the *Canning* left the breakwater, the *Bellanoch* was ever more than two or three hundred yards to the right of the line of the course which the *Canning* was taking, if so much. The decision of this

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Court in the case of *The Beryl* (1) establishes what I should have thought was evident, even without a decision, viz., that the Regulations are intended not only to prevent collision, but to prevent risk of collision, and that they are applicable at a time when the risk of collision can be avoided. In fact, neither party seems to have suggested in the Court below that the Regulations were not applicable throughout, and the decision takes it to be so.

The next point that is clearly made out is that these ships were crossing ships. From the first the *Canning* had the *Bellanoch* on her starboard bow, and therefore, by art. 19, was from the first under the obligation of keeping out of the way of the *Bellanoch*. This renders it indisputable that the *Bellanoch*, by virtue of art. 21, was from the first under the correlative duty of keeping her course and speed. The judgment of the Court below finds that she did so. I shall in favour of the *Bellanoch* accept this finding as correct, and, indeed, I agree with it. The circumstances were peculiar, but certainly the *Bellanoch* was keeping the same course throughout and was going at the best speed she could under the circumstances. Similarly, I shall accept in the *Bellanoch's* favour the finding that she was "under command," though I have more doubt about it. A reasonable interpretation of "under command" would seem to me to be that the ship is capable of performing the ordinary manœuvres which would be expected of such a ship, and I have doubts as to whether a steamer that can only go ahead, and that very slowly, by repeated reversals of her engines, and can only imperfectly obey her helm by reason that she is on the ground, can be said to be "under command." But it is unnecessary for me to discuss either of these findings, for I shall assume them in favour of the *Bellanoch*. If either of them be not justified she was certainly at fault. It is admitted that she did not give the signals required by art. 4 to be given by a ship that is not under command.

The next point that is clearly made out is that these two vessels were throughout in sight of one another. It could not be otherwise, for there was no obstacle whatever in the way, and it was fine weather and daylight. In fact all the evidence shews that not only were the ships in sight one of the other, but that

(1) (1884) 9 P. D. 137.

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the men on each ship were actually watching the other ship. It follows as a statutory conclusion from these facts that under art. 28 the *Bellanoch* was throughout under the obligation to give the sound signals there prescribed in order to indicate to the approaching ship what she was doing. Now, we have it, both from her log and from the evidence of her helmsman, that during this period the engines of the *Bellanoch* were on three occasions going full speed astern, and therefore it was her duty to give on each of those occasions the signal of three short blasts to indicate the fact. She did not do so on any of the occasions. Similarly, when going ahead, though proceeding under a port helm, she omitted until the last occasion to give the corresponding signal, and then only did so at the last moment. She therefore committed a breach of the Regulations, or, as it is commonly called, incurred statutory blame, and must, under s. 419 of the Merchant Shipping Act, 1894, be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the Regulations necessary.

There is no pretence for saying that any such circumstances existed in the present case. No one could contend that it was necessary for the master of the *Bellanoch* to omit to give these signals on any one of the three occasions. Nor does the judgment of the learned President proceed on any such ground. He absolves the *Bellanoch* from blame for not giving the statutory signals by calling to aid the provisions of art. 27, and it is this part of the judgment of the learned President which I view with such great misgiving, deepened by the respect I have for his judgment and his long experience in these matters. He holds that the master of the *Bellanoch* was justified in withholding the signals, which would have indicated to the *Canning* that she was reversing her engines, because the information so given might have induced the master of the *Canning* to take a wrong course. It appears to me that this is pessimi exempli. The Regulation directs that the vessel shall give the prescribed signal when the engines are going full speed astern. It is not left to the master to decide whether or not it would be better to give the prescribed signal. The object of this Regulation being made statutory and enforced

by such strong statutory sanctions is for the very purpose of preventing masters from so acting. The master of the *Canning* was entitled to be told what the *Bellanoch* was doing, and the responsibility was upon him to take the proper course upon such information being given. The gravity of the decision is that it takes the material issue to be whether the master of the *Bellanoch* acted with good intentions and not whether he acted according to the Regulations. The decision of the Court that he was justified in withholding the information because it might be put to a wrong use would, in my opinion, destroy the value of the imperative character of the provisions, and it would leave masters of all vessels uncertain whether they were being informed or deceived as to the movements of the vessels near them. I hold, therefore, that it is a breach of the Regulation to withhold these signals on the occasions when they are prescribed, and that such a breach is not purged by shewing that it was possible, or that the master of the defaulting ship believed it to be possible, that the information might encourage the other ship to act unwisely.

Moreover, I have the gravest doubt whether art. 27 has any application to a case of the withholding of information ordered to be given by art. 28. It will be seen that art. 27 comes at the end of and forms a member of a group of articles headed "Steering and Sailing Rules." It does not stand apart, as does art. 29, so that the word "rules," when used in it, has to be taken by the Court to have general application to all the thirty-one rules and regulations, but it may bear the more limited meaning which would make it apply only to the group of rules in which it stands. When the language of art. 27 is closely scrutinized, the probability of this being the true interpretation is greatly increased, because we find that it speaks of a departure from the "above rules." It is scarcely possible that in a code drawn up with such care the word "above" would have been inserted if the word "rules" was intended to have the broader and not the more limited construction, and, although I do not wish to decide the point, I incline to the view that art. 27 had in contemplation only deviations from the "steering and sailing rules," and that above all it did not contemplate any relaxation of imperative orders as to signals such as are contained in

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art. 28. Nor do I think that it applies to circumstances such as are found in the present case. It does not leave masters at liberty to consider to what extent they shall obey the Regulations as to signals during a period of from five to twenty minutes before the collision, but only applies to cases in which, in the throes of danger, a departure from the strict observance of the rules is imperatively forced upon the master of a ship by the peril in which he is placed.

The Courts have by their decisions rendered it necessary to notice another point which may in some cases be raised. They have held that where the omission is of such a character that it could not possibly have affected the events, it may be put on one side as not material to the case. The form in which this legal principle is ordinarily stated is that, where there is a breach of the Regulations, the offending vessel may still be held not to be in fault if it can be shewn that the breach could not possibly have affected the matter. It must, however, be borne in mind that the issue thus raised is not whether the performance of the obligation would have affected the collision, but whether it could possibly have done so. For instance, if a ship is run down in broad daylight her rights would not be affected by the fact that she was not carrying an efficient fog-horn, or if she was run down by a vessel which was all the time to port, her rights would not be affected by its being shewn that something was wrong with her starboard light, if that could not possibly have been seen by the offending vessel. The circumstances in *The Duke of Buccleuch* (1), which is the case usually quoted in support of the doctrine, were substantially of this latter kind, inasmuch as the statutory breach was a defect in one of the lights of the vessel which could not possibly have affected the matter.

This immunity from the penal consequences of non-performance of a Regulation must not be treated as though it were another statutory exception of like status to that to be found at the end of s. 419, sub-s. 4. The Courts have no power so to add to a statute. The matter depends solely on the right of a Court to reject that which is in its nature essentially immaterial

(1) [1891] A. C. 310.

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in fact when it is considering the purview of the statute. It is somewhat akin to an application of the legal maxim: de non apparentibus et de non existentibus eadem est ratio.

But no circumstances exist here which would justify the application of such a principle. It is impossible to say that if the *Canning* had been told on three separate occasions within a space of less than half an hour that the *Bellanoch* had reversed her engines, it might not have affected the conduct of the *Canning*. The stupidest of sailors must have realized that he could not calculate on the behaviour of a ship that was crossing his course, and which it was his duty to avoid, when she was alternately driving her engines ahead and astern in this way, and a natural consequence would be that he would approach her slowly and give her a wide berth when passing her. The information might have induced the *Canning* not only to lessen her speed; but also to vary her course, for I can see no reason why a vessel of her draught might not have ported her helm before reaching the buoys, and indeed the master of the *Bellanoch* makes it a specific ground of complaint against her that she did not do so.

But it is not necessary or permissible to argue whether the *Canning* would or would not have acted thus on the information given to her. It is sufficient if the information was of a character which might possibly bear on the question of her course and speed, and it appears to me impossible to decide this otherwise than in the affirmative. In my opinion the Courts must be very careful lest, under the plea that a breach of the statutory regulations could not possibly have affected events, they allow to creep in the question of what would or would not probably have occurred had the regulation been adhered to, and thus reintroduce the old issue of whether the breach contributed to the collision, which it was the direct object of s. 419 to abolish in cases of breaches of the statutory regulations. The statutory blame makes the offending vessel in fault, unless the omission is of such a nature that it could not possibly have affected the course of events in any way, and I doubt if we can say this in any case where the omission is not of a matter which would never have come to the knowledge of the other ship. I am, therefore, of opinion that both vessels were to blame.

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KENNEDY L.J. I have had an opportunity of reading the judgment which has been pronounced by the Lord Chief Justice, and I entirely concur in that judgment, both in its reasons and in its conclusions.

I also desire to say that, with one slight exception, which is really immaterial for the purpose of this appeal, I agree with the judgment which was pronounced by the President of the Division. That slight exception is this, that I do not find in the evidence anything which would lead to the conclusion that there was some current setting across the course which might account for the mistake made by those who were navigating the *Canning* in not giving her room enough to clear the vessel which they were bound to avoid. Having said so much, I desire to add but few words to the judgments already pronounced.

In my opinion it is clear that there was no necessity, under the terms of the rule referred to, for any signal to be given by the *Bellanoch* such as has been suggested in support of the appeal. There is no question, as it appears to me, of a judicial view in varying, or seeking to vary, statutory regulations, because in my opinion the statutory regulation referred to has no application to the period at which it is suggested that the *Bellanoch* ought to have been giving the signal that she was at that time reversing. Nobody can dispute, in this Court, the judgment which has been given in the case of *The Beryl* (1), which dealt authoritatively with the question of the time at which a vessel, with whom a duty to act lies, ought to take steps, in accordance with the rules, to fulfil her duty, and nobody disputes that the time is when it is, or ought to be, apparent that there will be risk if nothing is done to prevent it. That is the rule, and it is, in the present case, in my opinion not the true view of the facts that the period as to which the complaint is made of the *Bellanoch's* not sounding her whistle was a period at which it was, or ought to have been, apparent to those on board of her that there was risk if nothing was done.

I think, as a matter of fact, that there was no point prior to the time at which the offending vessel, the *Canning*, reached the buoys, at which there was anything which, under art. 28, called

(1) 9 P. D. 137.

for a signal from the *Bellanoch;* indeed, I would go so far, (and I have the support of a judge of very great experience, the President of the Admiralty Division), as to say that I think it would have been a wrong thing, because misleading. But I wish to point out, with regard to that, that as I read the President's judgment it certainly does not, as a necessary ground for the conclusion in favour of the *Bellanoch*, say that the *Bellanoch* must be held to be excused under art. 27. The learned judge has expressly found that there was no breach on her part, but he goes on further to say that if there is a technical breach proved he holds her excused under this article. I do not think it necessary to enter into the discussion of that; but it is only just to him, after what has been said, to point out that his reference to art. 27 is preceded by the words "even if it could be said that there was a breach of the article"—and this means, as I read the passage, that if there was a breach of art. 28 he was prepared to hold there was a ground of absolution from blame under art. 27.

I certainly hold that there was no obligation on the part of those who were navigating the *Bellanoch* to give any intimation until the other vessel was in a position not of risk of collision, but in a position in which it ought to be apparent that there would be risk if nothing was done on the part of the *Canning* to prevent it. I confess myself as leaning to the view that one ought, unless of course a reasonable explanation can be given, to treat with some suspicion a change of case in the course of an Admiralty trial. I look at the case which is actually put by the *Canning* in paragraph 3 of the statement of claim in which they set out their statement of facts and their complaint. The plaintiffs describe themselves as having more particularly noticed the *Bellanoch* apparently under way about three-quarters of a mile off, and about ahead, and then follow these words: "The *Canning* kept on down the channel till she was in a position at the Black Buoys to do so, when she hard-a-ported her helm to pass astern of the *Bellanoch*, which had remained in much the same position." It appears to me to be a just inference, and a very clear inference, that the meaning of the plea is that there was nothing we could do, nothing which we were in a position to do, until we passed the buoys; in other words, if they were

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observing the duty cast upon them, of avoiding the other ship in the position in which she was, they were not, till they reached the Black Buoys, in a position to act at all, and it was, therefore, not material that any signal should be given to them until the *Canning* reached the buoys. It seems to me that the complaint which the plaintiffs meant to urge and which they intended to put forward on the pleadings is that after the *Canning* had reached the Black Buoys, and after, as is beyond question, the position arose in which the rule in *The Beryl* (1) would apply, the other vessel was in fault. That is the real case which they meant to allege. Then they go on to say that "as the *Canning*, swinging under her port helm, drew nearer to the *Bellanoch*, the latter was observed to be moving astern," and so on. It is quite true that they do include art. 28 in paragraph 7 of the claim as an allegation that there was a breach of that article; but to what period were they then referring? Not to the period before the *Canning* reached the buoys, which they themselves have by their pleadings discarded as an important period. What they mean to allege as a ground of complaint is that the *Bellanoch*, after she was port to port, and when the period of action, and duty of signalling the action, under the rules had arisen, moved her engines astern without giving the signal under art. 28. I understand, looking at the pleadings and the evidence, that that was the case which they came to fight, and upon which they would have had real ground of complaint had their evidence been deemed truthful, and had it been believed by the Court that the *Bellanoch* did then go astern. If she did, she was bound to give a signal under art. 28, and it is upon the absence of the signal at that time that their complaint under art. 28 is, it appears to me, intended to be based. It seems to me that the point of absence of signal as regards reversing the engines at the earlier stage is not only a merely technical point, but a point that the plaintiffs, as they presented their case, did not intend to make, and I think rightly, because, when you look at art. 28, that says that when vessels are in sight of one another "a steam vessel under way, in taking any course 'authorized or required' by

(1) 9 P. D. 137.

these rules, shall indicate that course" by certain signals on her whistle or siren, namely, if she reverses, three short blasts to mean, "My engines are going full speed astern." To what period does that relate? I am not at all desiring to put a narrow meaning on the words "authorized or required," but "authorized or required" must surely relate to some action affecting the vessel's course at the period at which, according to the doctrine of *The Beryl* (1), a careful and competent seaman ought to act in order to avoid risk of collision, for then he is authorized or required to act, and if he acts he ought, under this rule, to notify the manœuvre to the other vessel in the prescribed way. In *The Uskmoor* (2), which was referred to, the effect of the judgment is that the word "authorized" has a larger meaning than "required," and includes any course which good seamanship would suggest. If a loaded vessel going down a dredged channel, until she gets to the buoys, cannot safely navigate in relation to the other vessel below the buoys, if those in charge of her know that the other vessel would not expect her to manœuvre for that other vessel before reaching the buoys, it seems to me that there is no requirement or authority under the rule binding upon those on board of this other vessel—until the buoys are reached by the vessel going down the channel, and she can act—to give to her the signals mentioned in the rule. I am of opinion that in this matter the *Bellanoch* is free from blame, and that the judgment appealed against is right.

Appeal dismissed.

Solicitors for appellants (plaintiffs), owners of the *Canning: Stokes & Stokes, for Thornely & Cameron, Liverpool.*

Solicitors for respondents (defendants), owners of the *Bellanoch: Lowless & Co.*

(1) 9 P. D 137. (2) [1902] P. 250

T. L. M.

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1907
March 15.

[IN THE COURT OF APPEAL.]

THE CRUSADER.

Admiralty—Salvage—Agreement—Position of Ship's Agent—Ratification.

A large steamship belonging to the defendants, laden with sugar from Java to Port Said for orders, was coaled at Colombo by the plaintiffs, who acted in the usual way as ship's agents. A few days afterwards the vessel grounded on Gofar Island in the Maldives and remained fast. Her master sent the chief officer back to Colombo with a letter to the plaintiffs acquainting them with the situation, telling them that he wanted a powerful tug, and that they were to draw on the defendants, the owners of the ship, for disbursements. He also suggested that a contract for a salvage boat, "no cure, no pay," might be advisable. The plaintiffs, finding that the latter proposition was impracticable, engaged a Government tug at a rate working out at about 60*l.* a day, and, making themselves personally liable for the payment of the hire, insured the tug for a limited period. The tug proceeded to the vessel with a representative of the plaintiffs on board. The master, doubting whether his vessel could be got off, declined to accept the services of the tug except on a "no cure, no pay" agreement, and accordingly, after some discussion with the plaintiffs' representative as to terms, the master signed a letter agreeing on behalf of the defendants to pay the plaintiffs 4000*l.* if the vessel was successfully floated. The tug then made fast, and, in the course of the next day's towage, the vessel came off. The plaintiffs claimed 4000*l.*:—

Held by the Court of Appeal (Lord Alverstone C.J., Fletcher Moulton and Kennedy L.JJ.), affirming the decision of Sir Gorell Barnes, President, that the plaintiffs could not be allowed to ratify the act of their representative, as, in the circumstances, the substituted agreement, insisted upon by the master and assented to by their representative, by which they were constituted salvors, was unreasonable, and the plaintiffs must be deemed, not only when engaging the tug, but throughout the operations, to have acted as agents of the ship. In that capacity they were only entitled to recover by personal action repayment of their disbursements, together with the usual agency charges.

Appeal by plaintiffs, Clarke, Young & Co., in an action of salvage, against a decision of Sir Gorell Barnes, President, in favour of the defendants, the owners of the *Crusader*, her cargo and freight.

The case is fully reported in the Court below (1), and raised the question as to the principle upon which the Court acts in

(1) *Ante*, p 15.

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refusing to give effect to a salvage agreement made by a ship's agent with a ship master.

On August 5, 1905, the *Crusader*, a steel screw steamship of 4210 tons gross register, from Java to Port Said for orders, with a cargo of 6000 tons of sugar, called at Colombo, and was supplied with coal by the defendants' contractor, the Colombo Coaling Company, through the plaintiffs, who acted as the ship's agents, and who would be reimbursed in the ordinary way by master's drafts. On August 7, about 9.15 P.M., the vessel went ashore on Gofar Island in the Maldives. Soundings were taken which shewed that she had run on a coral reef and was lying in sixteen feet of water forward, increasing rapidly aft with her stern in deep water of over 200 fathoms. She was leaking in No. 1 tank and in the port bilge, but the water was kept down with the donkey pump. Attempts were made to back the vessel off by working the engines astern whilst jettisoning cargo forward, but she remained fast. On the following day an anchor was run out from the port bow and dropped as far aft as possible, and at high water the anchor was hove upon by the winch to assist the engines, but without success. On the morning of the 9th the anchor carried away, and the vessel afterwards sagged round with her starboard side towards the reef and lay with a list to port. The chief officer was then sent to Mali Island to obtain a junk from the Sultan of the Maldives, in which to proceed to Colombo for a tug. The work of jettisoning was continued with the help of native labour. On August 11 the chief officer returned with the junk, and later on the same day was sent by the master to Colombo with the following letter, dated the same day, and addressed to the plaintiffs, to whom it was delivered by the chief officer on the morning of August 15 :—

"Dear Sirs,—This will introduce to you Mr. Milburn, chief mate of the *Crusader*. Kindly give him every assistance, and draw for disbursements on my owners. The *Crusader* ran ashore here the night of the 7th instant. I am jettisoning cargo forward, but as the reef is so steep, having under the stern of the steamer over 200 fathoms water, and forward only 16 feet, I can make no use of the anchors, having lost already stream anchor and new wire rope. I require a good powerful tug. The Sultan of the Maldive

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Islands has kindly promised me assistance as to labour, but that alone will not get the steamer off as the current sets on the reef, and as we lighten so we drive further on. A salvage boat would be of assistance, on the principle of 'no cure no pay.' I will probably be able to make better terms here than you can at Colombo with salvage boat when he sees the situation. So far she is only leaking slightly in fore peak and No. 1 tank. Please inform Lloyd's agents. My chief officer has telegram and letter for my owners, which please forward. Despatch of tug is of the utmost importance, so do not delay. I am, dear sirs, yours faithfully, Fred. Brown, master ss. *Crusader*. P.S.—Have you dry dock or pontoon at Colombo that would take a steamer like *Crusader*, 360 feet long, 48·2 feet beam, no keel; but has bilge clogs one on each keel? Can cargo also be warehoused at a reasonable price during steamer's detention in dry dock? Please send me also Rs.500 by chief mate to pay labourers for lightening and pumping at fore peak. If you have no dry dock will steam direct to Bombay.—F. Brown."

On the same day the plaintiffs despatched the telegram and letter of the master to the defendants, the owners of the *Crusader*, and themselves telegraphed, "Your interests have our attention; will wire again." They then consulted with Lloyd's agents at Colombo, and hired the Government twin-screw tug *Goliath* according to a tariff at the rate of Rs.750 per day with certain extras for water, extra men, ropes and other salvage appliances, and insured the tug for fourteen days (to be extended if necessary) for 15,000*l.* at 1 per cent. premium. On August 16 they informed the defendants by letter of these arrangements, and that they estimated the daily expense of the tug would be about 60*l.*, exclusive of agency fees. On the same day the *Goliath* left Colombo with the chief officer and C. T. Young, a clerk of the plaintiffs, and the extra hands on board, including a navigating officer in addition to the master. The tug arrived alongside the *Crusader* on the morning of the 19th, and C. T. Young went on board. The vessel was in the same position, but a large portion of her cargo had been jettisoned. A discussion then ensued with the master as to the arrangements made by the plaintiffs for the hire of the tug, and the master, under the impression

that his vessel could not be got off, refused to accept the services of the tug except on the basis of "no cure, no pay." The master offered 3000*l.*, which was refused by C. T. Young, who suggested 5000*l.*, and ultimately the following letter, addressed to C. T. Young as representing the plaintiffs, was signed by the master:—

"This is to certify that I as master of this ship and on behalf of my owners, the Eskside Steam Shipping Company, Limited, Whitby, have this day agreed with you to pay Messrs. Clarke, Young & Co. (on the no cure, no pay system) the sum of 4000*l.* (four thousand pounds sterling) if you succeed in floating the *Crusader* and see her safely into the nearest port if required. In the event of your doing so payment to be made by draft on my owners. It is of course understood that should you not succeed in floating this steamer I am to pay you nothing."

C. T. Young then returned to the tug and informed the crew that a salvage agreement had been entered into by him, and that they would be specially rewarded if successful.

About noon the *Goliath* made fast, but during a short towage the rope twice broke, and the *Crusader's* propeller was fouled. By the time the propeller was freed it was getting dark, and the tug, refusing to work at night, waited till daylight, though jettisoning was continued from No. 4 hold all night, and the ballast tanks were filled to keep the vessel in place. At 7 A.M. on the 20th the *Goliath* again made fast, and kept a strain on the rope to prevent the vessel from sagging further on to the reef whilst cargo was being jettisoned from Nos. 3 and 4 holds. At 2.30 P.M. all the ballast tanks were pumped out and the tug began to tow full speed, the *Crusader* also working her engines astern. At 3.10 P.M. the after part of the *Crusader* came clear of the reef. The after peak and Nos. 4 and 5 ballast tanks were then filled to raise the vessel forward. About 3.50 P.M. the tow line broke, but by 4.15 P.M. was again made fast, and towing was resumed, with the result that, about 5 P.M., the *Crusader* came off the reef, and was towed clear into deep water. She subsequently put back to Colombo under her own steam, arriving there about 6.30 P.M. on August 22, the tug having preceded her by a few hours. On August 23 the plaintiffs telegraphed to the

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defendants that the *Crusader* was floated, and informed them of the salvage agreement and asked for confirmation. After a second telegram the defendants, on the 25th, replied asking for an explanation, and on the 31st telegraphed that they declined to recognize the salvage agreement, and confirmed the original arrangement made on their account in respect of the tug. The letters of the master of the *Crusader* explanatory of his view of the matter are sufficiently referred to in the judgment given below.

The value of the *Crusader* in her damaged condition was 27,000*l.*, and that of the portion of her cargo which was saved 30,500*l.* The gross freight payable on delivery was 6013*l.*; but the expenses of the voyage subsequent to the services, including the expense of putting back to Colombo and discharging, and proceeding to Bombay to repair, and thence to Colombo to reload, and afterwards to Liverpool, the substituted port of discharge, exceeded the amount of the freight.

The plaintiffs claimed 4000*l.* under the agreement, or, alternatively, such an amount of salvage as might to the Court seem just, and, pursuant to an order of the registrar, delivered the following "particulars of expenses":—

Insurance of tug *Goliath*, Rs.2269.25; hire of tug, Rs.7836.50; messing charges of C. T. Young and the chief officer of the *Crusader*, Rs.50; expenses of plaintiff's representative to Maldive Island, Rs.300; total, Rs.10,455.75, or 697*l.* 1*s.* By further particulars delivered pursuant to order, the plaintiffs stated that "The agreement for the hire of the tug *Goliath* was made verbally between Mr. Clarke, jun., of the plaintiff firm and the acting master attendant and made by the plaintiffs as principals."

The defendants denied that the plaintiffs had rendered any salvage service to the *Crusader*, her cargo and freight, and denied the plaintiffs' right to maintain the action. Alternatively, whilst denying liability, the defendants brought into Court the sum of 500*l.* as salvage, as well as the sum of 697*l.* 1*s.*, being the disbursements mentioned, and said that these sums, amounting together to 1197*l.* 1*s.*, were sufficient to satisfy the plaintiffs' claim, if any, in the action.

The case was heard on November 9, 1906, by Sir Gorell Barnes, President, assisted by two of the Elder Brethren of the Trinity House, and the learned judge, after summarizing the facts already set out, said:—

The point taken for the plaintiffs is that they are entitled to recover this sum of 4000*l*. The defendants contend that they are not entitled to recover any salvage at all, neither the sum of 4000*l*. nor any sum, but that all that they can do is to maintain a personal action against the actual owners of the ship for the amount of the disbursements, together with a commission on them; because, they say, the plaintiffs, in the circumstances, were only acting as agents, and had no right to recover anything more than their out-of-pocket expenses, plus a commission.

There are one or two letters and telegrams which bear upon these points more specifically. The first letter is one from Messrs. Clarke, Young & Co. to the master of the *Crusader*. I think it was sent by or taken with Mr. Young, the clerk I have mentioned. In it they say: "We send you as requested Rs.500 by the chief mate. The tug we have chartered is the only one available, and is owned by the Ceylon Government. There is little chance here of assistance on the 'no cure no pay' principle. We have also wired your owners to-day stating that their interests have our attention, and that a tug is proceeding to your assistance." On the same day they forwarded a telegram from the master to his owners, which is referred to as having been sent, and they also telegraphed to the owners as follows: "*Crusader*. Your interests have our attention; will wire again." On the same day they wired: "Tug will proceed to her assistance to-night." On the 16th they wrote a letter to the owners, which contained these passages: "The captain requested us to send him a good powerful tug. We have accordingly chartered from the Ceylon Government the *Goliath* and despatched her to the scene of the accident this morning soon after 8 o'clock. She should reach the *Crusader* at daybreak on the 18th instant. Our representative, Mr. C. T. Young, left by the tug with letters of introduction to the Sultan of the Maldives and others in case of need. Mr. Young will consult with Captain Brown, and your interests will have our best attention. Lloyd's agents were

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immediately advised of the disaster. We have advised the captain that we have no dry dock or pontoon suitable for a steamer of the *Crusader's* dimensions, so that if he gets off he will no doubt proceed direct to Bombay. The new Colombo dock will be ready probably next year. At the captain's request we have forwarded him through the chief officer, Mr. Milburn, Rs.500 in cash for labour, which may be required. We shall now have to wait at least five or six days for the next news of the steamer, when you will be fully advised. We confirm the telegram sent to you by Captain Brown, also these (two) sent by us to you yesterday. The chief officer returned to the *Crusader* by the tug. P.S.—The cost of hiring tug inclusive of coals is Rs.750 a day or part of a day, and there are other charges, such as water and extra crew, which we estimate will bring the daily expense of the tug up to about 60*l.* sterling. Any damage to ropes has to be made good by hirers of the tug. We have also had to insure the tug for 15,000*l.* for fourteen days at 1 per cent. Agency fee, i.e., commission on disbursements, has not been included in above figures."

There is nothing else that I need refer to until August 22, when a telegram was sent from the plaintiffs to the defendants: "Tug floated *Crusader*. About half cargo jettisoned. Expected Colombo to-night. Salving agreement made for 4000*l.* Will wire again." And the next day they sent off a telegram saying: "We refer to our telegram of yesterday. Confirm by telegraph salvage agreement made for 4000*l.*" The owners and the Salvage Association in this country telegraphed for information. There is a telegram from the Salvage Association, but there is one which I wish to refer to from the defendants on August 27, as follows: "Wire explanation why salvage agreement was made by captain with Government tug when engagement was 60*l.* a day. Owners and underwriters decline confirm. Retain possession cargo. Keep the sound separate from that which is damaged." A further telegram on September 1 from the owners to the plaintiffs reads thus: "Referring to your salvage claim 4000*l.*, we decline to recognize same, and can only confirm original arrangement made by you on our account with Government tug."

I think that completes the documents which it is necessary to

refer to, with the exception, perhaps, of one letter from the master, to which I wish to draw attention later.

It seems to me to result from this statement of facts that the plaintiffs acted as agents for the owners in making the arrangements with the Government for the use of the tug. I think that the evidence which has been given in the depositions, and viva voce, makes it quite plain that that was the position of the plaintiffs, and that the postscript to the letter commencing "The cost of hiring tug" and ending "agency fee, i.e., commission on disbursements, has not been included in above figures," makes it perfectly plain; and really I do not think that the arguments which have been addressed to me have differed from that view of the case as a whole. That being so, the position of the parties was this: that the plaintiffs had made themselves responsible to the Government for the hire of the tug, and would have a right to recover whatever they paid to the Government from the owners of the ship, and in ordinary course would, as indicated in the letters, have drawn for it and charged a commission on the disbursements. I think that is also in accordance with the wishes of the master, and the authority for the plaintiffs to act which they derived from him, contained in the master's letter of August 11. The authority to act upon that letter was accepted by the plaintiffs when they wrote to the master the letter of August 15, to which I have referred. That being the position, the liability of the owners of the ship seems to me to have become complete, and the bargain between the parties to have been definitely fixed.

Of course that leaves for consideration what the position was when the tug arrived at the Maldive Islands, and when the alleged agreement sued upon was made. At that moment I think it is clear, from what I have stated, that Mr. Young, the clerk, was going out as the representative of Messrs. Clarke, Young & Co., the plaintiffs, to carry out the bargain which had already been made for the employment of the tug; and my opinion is that he had no authority whatever from his principals to alter that bargain, so far as they were concerned, because if he did so, in such a manner as it is contended he has done, he was placing them in the position of having no remedy for the

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expenses they had already incurred against the owners of the vessel should the ship not be salved.

But that does not necessarily dispose of this point, because his principals could ratify his action if they chose, and say, "Although you may not have acted with proper authority from us to destroy the rights which we had under the contract we made on the liability of the owners, we will ratify what you have done, and adopt it," and they say, "We have done so, and we are now suing on the contract." So that there is a difficulty in saying that this case can be disposed of simply upon the ground that Mr. Young had no authority to make this bargain. I do not think that at the time he made it he had any authority to act in the way he did. I do not for one moment say that he was acting with any want of bona fides. I think he acted probably as best he could under the circumstances. Because what was the situation? The master of the vessel apparently would not accept the tug, when she got there, on the footing on which she had been engaged, and what he says, in one or two letters and telegrams, is this: In the telegram to his owners of August 28, he says, "Your telegram received," and after dealing with the matter he goes on as follows: "Confirm salvage agreement made with collieries' representative 4000*l.* no cure no pay. I insisted make agreement, considered best interests all concerned rather than allow tug work indefinitely, possibly no results. I consider the demand very moderate considering risks." That is his telegram, and he practically maintains that position in his subsequent letters; but there is one which perhaps may be used as shewing his more elaborate view of the matter: "I have very little to add why I made a salvage agreement. The honest truth is I never expected her to come off. The chief engineer and self knew a rock was working itself through above the margin plate in the engine room. The master of the tug boat refused to tow (or keep a strain on the rope) all night, so that, as we lightened in the day-time, the ship drove only further up at night; then she had only two tow lines; and Captain Rankin of the tug told me there were no others in Colombo, and they would have to send to Calcutta for more if both broke. Besides, they would leave the ship three days before the fourteen days of insurance expired, I could see from the first that they intended to fool around the

steamer, and when their time was up go home again. I offered Mr. Young 3000*l.* at first, but as he pointed out to me that he would have to pay large bonuses to the two masters and first engineer in the tug boat, and the risk his firm ran if he was not successful, it was then increased to 4000*l.*, and I firmly believe that without a salvage agreement she would not have come off." That is why Mr. Young made the salvage agreement. The master practically says he insisted upon it.

The question then comes to be whether the agreement can stand; in other words, whether the salvage claim which is put forward can be based upon it. There is a well-known principle in this Court, viz., that salvage is awarded for services rendered, not exactly on the basis of any contract, but as a remuneration, on public grounds, for service rendered to vessels or other property in distress. And there are certain principles which arise from that which are very well known also. Amongst them is the principle that the Court will not enforce an agreement—or not give effect to it, is the proper way of putting it—and not make a salvage award on the basis of an agreement, if the circumstances are such that it would not be just and equitable that it should do so. So it seems to me that the true matter to consider in this case is: what is the duty of the Court, and what are the rights of the parties, having regard to those principles? I think that enables this case to be settled without any serious difficulty. In the first place, the position of this vessel must not be left out of consideration. I held in one case that has been cited—*The Kate B. Jones* (1)—that an agent is not excluded from being a salvor, though his position affects to some extent the question of what his precise reward and rights are. I do not desire here to repeat anything that I said in that case. I do not think counsel questioned in the argument before me anything that that case lays down.

The next matter to consider is this. The vessel was in a dangerous position; and it may be—I am not going into that question—that if an independent salvor had been procured, for instance by telegraph from some coast port, or from some place like Colombo, and he had proceeded out, and had ultimately

(1) [1892] P. 366.

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rescued this vessel, that the sum which was agreed upon would not in such circumstances have been thought excessive, though there is to my mind considerable doubt about that, having regard to what had been done with the vessel by the time the tug got there. She had been lightened so much that she came off without difficulty. But that is not the situation in this case at all. When the tug arrived at this vessel she arrived under a binding bargain that her services were to be used for 60*l.* or thereabouts per day. On that, if the master in this case had understood the situation with anything like ordinary average intelligence, he would have seen that he could have used this tug for a day or two for a very small cost, say 120*l.* or 180*l.* for three days, and he could then make certain, one way or another, whether by the efforts of the tug alone, as the *Crusader* then lay, having discharged some of her cargo by jettisoning, he could get her off. The view that I take, and the view that the Elder Brethren take, is, that it was an absolutely outrageous thing for a master to attempt to make such a contract as this, having regard to the situation. The man was acting in an extremely stupid and foolish way. I cannot follow the reasoning in his letters which led him to take that course, unless this was it—and that is where it may be pointed out that he was not so foolish as at first sight he seems to have been—that he did not realize that he was entitled to use this tug for 60*l.* per day as long as he chose. I cannot believe myself, because the man is said to be intelligent, that he thoroughly grasped, or was adequately informed of, the position which that placed him in, because it is so obvious that a trifling expense for an effort the next day would enable him to see whether he was going to get the ship off or not; and he could have waited until then to make his big bargain, if he thought it necessary, to clear himself from the difficulties which surrounded him. That being so, even if the plaintiffs' agent has had his act ratified, and even if he acted quite straightforwardly himself in making the contract with the master, who was insisting upon it at the time, I do not think this Court can allow the plaintiffs to ratify and adopt that act so as to give them a right to enforce a salvage claim based upon it. To my mind their rights rest where their bargain originally was,

namely, to get their disbursements from the owners of the vessel, and charge them also a proper and reasonable commission (whatever the usual rate is for commission) on the disbursements for the work done.

That is what is really the right and proper result of this case. What have the plaintiffs done except what they undertook to do when they acted upon the master's message, sent through the mate? They have done nothing whatever, except make a bargain for a tug, and they were content then to make that bargain, notwithstanding the liability to pay for the tug, provided they got adequate remuneration in the shape of commission on their disbursements.

In my opinion the plaintiffs are endeavouring to enforce a claim under circumstances in which this Court will not assist them. My judgment must be for the defendants with costs, but costs will be subject to counsel for the defendants agreeing—and I understand they do agree—that the plaintiffs shall take out of Court the sum of 697*l.* paid in for disbursements, and also undertake on behalf of the defendants to pay the necessary agency commission, which I will fix at 5 per cent., and the plaintiffs will be allowed their costs of the application for a commission to take evidence in Colombo.

On appeal :—

Aspinall, K.C., and *C. Robertson Dunlop*, for the appellants (plaintiffs), Clarke, Young & Co. The agreement made by the plaintiffs' agent with the master of the *Crusader* ought to be upheld, for the master only allowed the tug to make fast on condition that the plaintiffs waived all their antecedent rights to payment for work done as agents and, as salvors, undertook the whole responsibility for the expenses already incurred and to be incurred in respect of the tug. The master had apparently before the arrival of the tug—in view of the failure of his efforts to get the ship off, and the damage to the ship's plates reported by the engineer—made up his mind that the chances of the vessel being salved were remote, and, therefore, considered that by insisting on a "no cure, no pay," agreement he was making an advantageous arrangement for his owners, and ensuring the

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energetic services of the tug. The master on the spot, without the possibility of communicating with his owners, and with no other assistance available, had full authority, as their agent, to bind his owners, and, the plaintiffs having ratified the action into which their representative was practically driven by the master, the transaction was not only complete, but legally binding. The sum of 4000*l.* on a value of 57,500*l.* cannot be deemed inequitable, taking into account the critical position of the ship, and the learned judge in the Court below seems to agree that, if at the end of three days the vessel did not come off, the very agreement now sued upon could have been properly made by the master with the plaintiffs, and it would not be in the interests of navigation to establish the doctrine that in circumstances such as those now before the Court a master has not authority to enter into a fresh arrangement which he deems advantageous for his owners. It also seems clear that if the sum of 4000*l.* had been demanded by an independent salvor arriving on the scene, the Court could not have refused to enforce the claim on the ground that it was unreasonable. In *The Kate B. Jones* (1) the defendants, the owners of the ship in distress, wired to the ship's agents, "If possible, make all agreements no cure, no pay," but the ship's agents were held not to be precluded from claiming as salvors.

Laing, K.C., and *Dawson Miller*, for the respondents (defendants), owners of the *Crusader*, her cargo, and freight. At all material times the plaintiffs occupied the position of agents of the defendants, and, as such, they are precluded from setting up a claim adverse to the interests of their principals. In response to the master's letter delivered to them by the chief officer, the plaintiffs had made such arrangements that, when the tug left Colombo, a complete bargain existed in respect of her services, and for the hire of the tug, and all the attendant expenses, the defendants were liable through the plaintiffs. The so-called representative of the plaintiffs sent out in the tug was, as the learned judge in the Court below has pointed out, not a partner, but only a clerk in their employ. He was the bearer of letters of introduction to the Sultan of the Maldives in case

(1) [1892] P. 366.

further assistance from that quarter should prove desirable. In no sense could he be deemed the authorized agent of the plaintiffs to enter into a fresh agreement of a salvage character with the master of the *Crusader*, even assuming that, in the circumstances, the master and a representative of the plaintiffs would have had authority to alter the liability of the owners of the vessel under the then existing arrangement, and substitute the plaintiffs as principals in the position of salvors. The services rendered by the tug were those contracted for by the plaintiffs on behalf of the defendant owners of the ship.

Aspinall, K.C., in reply.

LORD ALVERSTONE C.J. This case presents, to my mind, very great difficulties, and I am not sure that had I been sitting as a judge of first instance I should have come to the same conclusion as that which I am about to pronounce in affirming the judgment of the President.

The only ground upon which this judgment can be affirmed is that it was not reasonable for the master of the *Crusader*, in the exercise of the full authority which, for reasons I will state in a moment, I think he has, to enter into the bargain into which he did enter, or, to put it in another way, that it was not reasonable for a man who could have got under an existing agreement practically all he got under the new agreement, with one exception, to enter into the agreement in question.

I notice that in the Court below the President appears to have asked the Elder Brethren some questions, which led him to say that the view of the Elder Brethren and of himself was that it was an absolutely outrageous thing for the master to make such a bargain, having regard to all the circumstances. I very much doubt whether the Elder Brethren ought to have been consulted at all on such a point. It seems to me mainly a question of law, and all I have put to our assessors is a question whether a reasonably prudent master would not have tried what the tug could do under the existing agreement before he thought fit to insist upon any fresh agreement. While they do not in any way take the view that this agreement as an agreement was outrageous or absurd, they do advise us that a reasonably prudent master might well

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have tried what the tug could do under the existing arrangement without insisting upon "no cure, no pay." I have very great doubt whether, having regard to the rights and duties of the master, his belief that he was saving the cargo-owners as well as the shipowners their joint liability to pay the expense of the tug might not in some cases be sufficient to support an agreement of this kind. What is the position of the master of a ship in such a case? He is there as custodian of ship and cargo, and has to do the best he can for the protection and salvation of the whole adventure. He can jettison cargo in order to secure the safety of the rest, thereby imposing liabilities which are well understood in regard to general and particular average, as the case may be, upon the owners of ship and cargo. He can pledge the credit of his owners for large sums of money in order that the adventure may be brought to a successful issue. It is very important that the authority of the master and the obligation of the master to protect the interests of all concerned, and in so doing to bind his principals, the owners of the ship and the owners of the cargo, should be thoroughly respected, and I have felt very great reluctance, and I still feel it, even while supporting the judgment of the Court below, to hold that a bargain of this kind was unreasonable. It is said that it was unreasonable because the person with whom it was made owed certain duties to the shipowner, because he was the representative of the firm that had acted in the shipowner's interests in sending out the tug. I cannot put that higher than a circumstance to be taken into consideration. I cannot take the view that because the plaintiffs' clerk had gone out there in the tug which had been sent at the request of the master, the master acting for the whole adventure, therefore there would be anything inequitable in his concurring in an arrangement insisted upon by the master, if it was a reasonable and proper arrangement for the master to make, having regard to his authority. It is found as a fact by the President that the master insisted upon a new bargain, and he has not suggested that the plaintiffs' representative pressed it or even mentioned it in any shape or form until the master himself insisted upon it.

In my opinion the evidence establishes, and I certainly take the

view of the evidence—which in no way differs from what the President has said—that the plaintiffs' clerk did put before the master the terms of the bargain he had got, that he put the matter before him on paper and told him he could have the tug at his disposal for so many days, and that the master, in the exercise of his judgment, refused to allow the tug to be employed on those terms. Therefore I cannot take the view that the person who goes out, and has no power of communicating with the people who send him out, and owes a duty in the sense that he ought to do the best in the circumstances, would be entering into an agreement which could not be enforced merely because when he started he had different instructions and different obligations having regard to the original arrangement under which the tug went out. If this had been a reasonable agreement—if the master was justified in making it in the interest of those whom he represented, having regard to the fact that there had been an original agreement —I do not think it would be right to decide that it was not enforceable. I have to ask myself whether or not I should be justified in reversing the finding of the President that this agreement was an unreasonable agreement. What presses upon my mind is this. I do not like the way in which the master has been attacked. On the other hand, counsel for the respondents have said, very fairly, that the master did not exercise reasonable judgment. He certainly could have had the services of the tug to do all the work which she actually did do for from one to four days at 60*l.* a day, and it is possible to support the view at which the learned President arrived by considering that it was not reasonable for the master, representing both the cargo owners and the shipowners, to insist upon an agreement of "no cure, no pay," at such a figure as he agreed to, without in some way seeing what was the value of the services which the tug would be bound to render under the agreement under which she came out. I have not overlooked the fact that circumstances may have altered in those few days, and that the day before she actually began work the engineer reported that there was serious danger to the ship. I have very little doubt that the master did honestly think that he was doing the best for all the people he

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represented when he made that bargain. I think, however, that is not sufficient if we come to the conclusion that it was, at the figure, an unreasonable bargain when their agent was in a position to obtain, under the terms under which the tug had been sent out, at his own request, substantially the same work done, or attempted to be done, practically speaking, at a very much smaller outlay and responsibility.

I therefore come to the conclusion that I am not able to interfere with the decision of the President in holding that this was not a reasonable bargain and therefore not one which people who had gone out as agents of the ship only ought to be allowed to enforce against the res. The other question remains, as to whether, notwithstanding that, we can give them any extra remuneration as salvage. I think we cannot, for the reason that the services actually rendered were those which were contemplated by the original agreement, and I am not able to take a view different to that which the learned President has taken as to the non-binding effect of the subsequent agreement. I think this appeal must be dismissed.

FLETCHER MOULTON L.J. I come to the same conclusion, and, apart from the reasons given by the Lord Chief Justice, I am of opinion that this salvage agreement cannot be enforced by reason of the circumstances under which it was made.

The facts are not in dispute. When the ship was in trouble on the rocks a letter was sent to the agents for the ship at Colombo asking them to send assistance. The evidence shews that these agents not only coaled the ship, but did everything else in connection with her that was necessary at Colombo. They wired the news of the mishap to the owners as early as August 15, when they said, "Your interests have our attention. Will wire again." They then set to work to get a tug to go out to the assistance of the ship, and they made themselves directly responsible both for the hire of it and the safety of it in the sense that they had to take out a policy of insurance to cover any possible damage to the tug. They wired the same day to the owners that "a tug will proceed to her assistance to-night." That is on the 15th. On the 16th they write a letter to the owners which in my opinion

establishes beyond a doubt that the position they took up was that they were acting on behalf of the owners of the ship, as their agents, attending to their interests and entitled as such to look to the owners to re-imburse them for their outlay. In this letter they set out all the steps that they have taken; they say that their representative has left with the tug, that he will consult with the master; and they add "your interests will have our best attention." In the postscript of the letter, which, as is not unusual, is the most important part, they set out the cost of hiring the tug and the terms of the hiring, including the insurance, so as to shew the owners of the ship what this assistance will cost. Then they add: "Agency fee—that is, commission on disbursements—has not been included in the above figures," thereby pointing out that the terms on which they are making the contract on behalf of the ship, and making themselves liable for these disbursements, are the terms of the ordinary commission on disbursements which agents there are accustomed to receive. It is impossible, after that letter, to look upon them as acting otherwise than as agents for the owners of the ship. They, therefore, can have no interest which is rival to the interest of the owners of the ship; and so clear is this on those letters and telegrams that counsel for the appellants admitted that the representative of the plaintiffs who went out with the tug went out as agent for the owners.

The tug, then, was hired at the expense of, and on behalf of, the owners, which is the same thing as being hired by the owners. The clerk of the plaintiffs who went out with it was, therefore, the agent for those owners so far at least as relates to the tug. Now, who are the parties at the ship? The parties are the master, who has certain very wide powers of acting on behalf of the owners of the ship and of the cargo too, and the plaintiffs' clerk, who is agent for the owners. Those two parties could not make a bargain, because they represented the same persons. The plaintiffs' clerk had no power to make any bargain, relating to the tug or its services, except in the interests of the owners. He could not, therefore, put himself in the position of an independent contracting party, making a contract between the plaintiffs' firm and the master of the ship, as representing the owners of the ship. Nor do I think that the

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master had any authority to make such a contract. He was in no necessity. The help that he wanted, and which was all the help that he was purporting to get by the contract which he entered into, was there ready for him, provided by the owners of the ship; and the consequence was that there was no need for him to make a bargain and no power for him to make such a bargain as would bind the owners of the ship, who had already made an existing bargain, by which the tug was there. However, he did make a bargain. If this bargain is to stand, what would be the position of the plaintiffs when the tug came back? Beyond question they had sent their clerk out as agent for the owners of the ship, and they were not personally bound by anything he had done in the matter unless they ratified it, so that if this ship had not been salved, and the tug had come back after a fruitless attempt, they would have been legally entitled to disregard this agreement of "no cure, no pay," and they would have been still in the position of having, as agents of the owners of the ship, contracted for the tug, and must have been reimbursed all the expense they had incurred, together with their agency fee on those disbursements. If, on the other hand, the tug came back having effected the salvage, as in the present case, they might ratify the act of their clerk and claim to be in a position to insist upon receiving 4000*l*. It seems to me that this would put them in a position in which they could say, "Heads I win, tails you lose." I feel pretty satisfied that they felt the difficulty of this position, because I find that they promptly telegraphed to the owners of the ship asking them for confirmation of the agreement. They must have felt that the master and their clerk had a very doubtful right to make any such agreement at all. They got back, naturally, a telegram from the owners of the ship to the effect that they did not confirm the new arrangement, because the tug boat had been hired at their expense, and all they were liable for was the cost of her hire.

In my opinion, therefore, this agreement for salvage was not an agreement which the Court can recognize, because it was made by the plaintiffs' clerk, when agent for the owners of the ship, in interests which were not identical with theirs.

KENNEDY L.J. I have come to the same conclusion, and substantially upon the ground stated by the Lord Chief Justice. I therefore only wish to add a very few words. I share his feeling of hesitation in supporting the judgment under appeal. It seems to me most important, both for the lives and property of persons engaged in mercantile enterprises, that shipowners at home should not be allowed lightly to repudiate agreements entered into honestly by their masters in stress of very difficult and trying circumstances in distant and, comparatively speaking, savage regions. The President does not suggest that there was dishonesty on the part either of the master of the *Crusader*, or of the clerk who, on behalf of the plaintiffs, agreed to the bargain which the plaintiffs seek to uphold.

In regard to the position of the clerk, I take the view that he was the authorized representative of the plaintiffs, and that, whilst the initial action of the plaintiffs was under a contract with the owners to do their best for them in the particular work of sending out to the *Crusader* a tug and their representative with it, there was nothing either in such action, or in their relations with the owners of the ship, to prevent the representative making a new bargain at Gofar Island with the master, as he must be taken as the person to whom the owners had given authority to act there on their behalf as might be justified by the emergency.

It is true, however, that a salvage agreement, in order to be binding on the shipowner, must satisfy the requirements mentioned in the judgment of Lord Esher in *The Renpor*. (1) It must be made honestly for the benefit of ship and cargo. There must also be necessity, in the sense not of an absolute necessity, but of that absence of reasonable alternative which most men mean, I think, when they speak of necessity in cases of this kind. The learned President has found no such necessity, no absence of reasonable alternative. He has found, on the contrary, that it was a foolish and even an outrageous bargain for the master to have made in the circumstances. He had the evidence before him, as well as the assistance of the Elder Brethren, and I am not prepared to dissent from that finding.

(1) (1883) 8 P. D. 115, at p. 118.

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I am able upon this ground to concur in the judgment of the Court in dismissing the appeal. I agree that this is not a case in which we could give salvage apart from the agreement. There was no case of changed circumstances to grant a right to salvage reward upon relations which were in their inception contractual.

Appeal dismissed.

Solicitors for appellants (plaintiffs) : *Pritchard & Sons.*
Solicitors for respondents (defendants) : *Botterell & Roche.*

T. L. M.

C. A. 1906 *April* 11. 1907 *March* 25, 26.

[IN THE COURT OF APPEAL.]

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Admiralty—Collision — Total Loss — Payment by Wrong-doer—Insurance, Marine—Valued Policy—Partial Insurance—Division of Amount received from Wrong-doer between Shipowner and Underwriter.

The owners of a steamship, which had run down a schooner, paid into Court 1000*l.*, the value of the schooner as assessed in the registry. Underwriters who had paid the owners of the schooner 1000*l.*, as being the amount for which she was insured, under a policy stating the value to be 1350*l.*, claimed the 1000*l.* :—

Held by the Court of Appeal (Sir Gorell Barnes, President, Fletcher Moulton and Kennedy L.JJ.), affirming the decision of Bargrave Deane J., that the owners of the schooner were entitled to be treated as their own insurers for 350*l.*, and, therefore, the 1000*l.* must be divided between them and the underwriters in the proportion of their respective interests, viz., 350-1350ths, and 1000-1350ths.

APPEAL by underwriters, and cross-appeal by owners, of an insured vessel sunk in collision, against a decision of Bargrave Deane J. as to the distribution of the amount, representing her value, paid into Court, with interest, by the wrong-doer.

On May 3, 1901, the schooner *Welsh Girl* was, during a fog, sunk in collision with an unknown steamship, and, efforts to trace the wrong-doer having failed, the Dee Shipowners Mutual Insurance Association, on April 21, 1902, paid 500*l.*, and on July 25 another 500*l.*, making together 1000*l.*, as for a total loss, that

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being the sum for which the owners of the *Welsh Girl* had insured the vessel with them, the policy stating the value to be 1350*l.*

The owners of the steamship *Commonwealth* were ultimately sued by the underwriters, in the name of the owners of the *Welsh Girl*, and on January 13, 1904, they admitted liability for the loss of the schooner by collision. As the result of the usual reference, and report of the registrar, the owners of the *Commonwealth* paid into Court, to the credit of the action, the sum of 1348*l.* 6*s.*, made up as follows: Schooner *Welsh Girl* 1000*l.*, freight 135*l.*, deposition 1*l.*, agency, postages, &c., 5*l.* 5*s.*, and interest 207*l.* 1*s.*

On February 22, 1906, the owners of the *Welsh Girl* applied by summons in chambers for payment out of Court of the sum of 1348*l.* 6*s.*, in the proportion—in respect of the 1000*l.* at which the schooner had been valued in the registry—of 350-1350ths of the 1000*l.* to them, and 1000-1350ths to the insurers.

The summons was adjourned into Court, and on—

1906. April 11. BARGRAVE DEANE J., in the course of his judgment, after deciding that the owners of the *Welsh Girl* had not, on receiving the second sum of 500*l.* in respect of the insurance, surrendered their rights over and above the 1000*l.* to the underwriters, said:—The vessel was valued at 1350*l.*, and she was insured for 1000*l.*; the result is that the club insured her for 1000*l.*, and the plaintiffs were their own insurers for 350*l.* The vessel was a total loss. Now, the club having paid the 1000*l.*, the question is: What about the 350*l.* the further value of the *Welsh Girl*? A number of cases have been cited as to the difference between a valued policy and an open policy, and without going into those cases, which I have been carefully looking into while I have been considering my judgment, I may say that the general effect of the law seems to be this, that, where it is a valued policy, you take the value in the policy as absolutely fixed and settled—neither side may go away from the value in the policy as to the value of the insurance; also, where the policy contains an agreed statement as to the true value of the ship, there can be no question between the parties as to what is the true value of the

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ship, even though hereafter it might be ascertained that the ship was of more or of less value than the amount so declared in the policy; and as between the parties the value so stated is definite and cannot be altered.

The case of the *Steamship Balmoral Co.* v. *Marten* (1) has been quoted, where the ship was worth 40,000*l.*, whereas she was only declared by the policy to be worth 33,000*l.*, and it was held that, where there had been a policy for 33,000*l.* and the declared value was 33,000*l.*, although subsequently the ship was ascertained to be worth 40,000*l.*, still 33,000*l.* was the proper amount.

In this particular case 1000*l.* has been paid, and the claim put forward by the owners of the *Welsh Girl* is this: they say that of that 1000*l.* you have to deal with it in the proportion of 350*l.* to 1350*l.*, and they say that they are entitled to receive 350-1350ths of 1000*l.*, that is, 259*l.* I leave out the freight, because it is admitted that the freight is entirely due to the owners of the *Welsh Girl.* Then there are two other items, the cost of the deposition 1*l.*, agency and postage 5*l.* 5*s.*, which it is quite clear have already been paid, by the accounts put in, to the owners of the *Welsh Girl;* therefore they go out. Then there is a proportion of interest claimed out of the amount which has been paid into Court. The amount paid into Court by the defendants is 207*l.* 1*s.*, and the owners of the *Welsh Girl* claim in proportion 350-1350ths of 207*l.* 1*s.*, that is, 72*l.* 13*s.* 4*d.* They say that the *Welsh Girl* ought to pay out of the 1000*l.* 1000-1350ths to the insurance club, making a total of 740*l.* 14*s.* 9*d.*, and a proportion of interest in the same way, amounting to 134*l.* 7*s.* 9*d.*—making a total of 875*l.* 2*s.* 6*d.* Those two sums together make 1348*l.* 6*s.*, which is the amount which the registrar has found to be payable by the defendants the owners of the *Commonwealth.*

The case of *The Livingstone* (2) has been referred to, but where conflicting decisions have been given by American and English Courts as a matter of course I adopt the English decision. The American decision is at variance with the leading case of *North of England Iron Steamship Insurance Association* v. *Armstrong* (3), which is a decision binding on me.

(1) [1902] A. C. 511. (2) (1904) 130 Fed. Rep. 746.
(3) (1870) L. R. 5 Q. B. 244.

I find as a matter of fact that the claim of the owners of the *Welsh Girl* is well founded, and I give judgment accordingly, each party paying his own costs of and incidental to this motion.

On May 28 the same learned judge decided that the solicitor and client costs, arising out of the evasion for three years of the owners of the *Commonwealth* to admit liability, should be borne by the parties proportionately to the total amounts recovered, and on July 16, on further consideration, he held that the sum of 207*l.* 1*s.*, being the interest which had accrued from the date of the casualty till payment of the total sum into Court by the owners of the *Commonwealth*, should be apportioned as follows: Full interest on the freight to the owners of the *Welsh Girl*, and interest on the whole 1000*l.* up to the date of the first instalment of 500*l.* paid by the underwriters. From that date up to the date of the payment of the second 500*l.* the interest on the 1000*l.* to be shared equally, and after that date the whole of the interest to go to the underwriters.

On appeal:—

1907. March 25, 26. *Scrutton, K.C.*, and *D. Stephens*, for the appellants, the Dee Shipowners Mutual Insurance Association, Limited.

Horridge, K.C., and *Maurice Hill*, for the respondents and cross-appellants, the owners of the *Welsh Girl*.

The arguments of counsel sufficiently appear from the judgment. The contention on behalf of the appellants was that the learned judge in the Court below had not correctly applied the principle of subrogation arising out of the performance of the insurance contract, and that, under that contract, the underwriters, having paid for a total loss, were entitled to the whole of the 1000*l.*, found by the registrar to be the value of the vessel, and recovered from the owners of the vessel which caused the loss.

On behalf of the respondents, as cross-appellants on the question of interest, it was contended that the learned judge was wrong in holding that the owners of the *Welsh Girl* could

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not claim any share of the interest after the second 500*l.* was paid by the underwriters, as—the owners of the *Welsh Girl* having been found entitled to 350-1350ths of the 1000*l.*—it followed that they were also entitled to a similar proportion of the interest.

In addition to the cases and text-book mentioned in the judgment the following were referred to: *Simpson* v. *Thomson* (1); *Castellain* v. *Preston*. (2)

SIR GORELL BARNES, PRESIDENT. This is an appeal from a decision of Bargrave Deane J., which, upon the principal point which we have to decide, seems to me to be substantially right.

An insurance had been effected by the owners of the *Welsh Girl* with their underwriters for the sum of 1000*l.*, by a valued policy in which the vessel was valued at 1350*l.* The *Welsh Girl* was sunk in collision with the steamship *Commonwealth*, and after some trouble, apparently, the *Commonwealth* was made responsible, and a sum of 1000*l.* in respect of the loss of the *Welsh Girl* was recovered in an action between the owners of the *Welsh Girl* and of her cargo and freight and her master and crew and the owners of the *Commonwealth*. In addition to what was recovered for the loss of the vessel there appears to have been something recovered for freight, and also certain interest on the sum recovered in respect of the loss of the ship. Now, that sum of 1000*l.* having been recovered, it is only necessary to state another fact which gave rise to the difficulty in the case. The underwriters of the *Welsh Girl* appear to have paid, after the loss of the ship, 500*l.* at first and afterwards another 500*l.*, making, therefore, the total sum of 1000*l.*, which they were liable to pay under their policy. Then, the money having been paid into Court in the case between the two ships, the motion has been made to ascertain the proportions in which the money in Court should be divided between the owners of the *Welsh Girl* and their underwriters. Bargrave Deane J., as I understand his decision, has found that the owners of the *Welsh Girl* were entitled to receive, out of the money paid into Court in

(1) (1877) 3 App. Cas. 279. (2) (1883) 11 Q. B. D. 380, at pp. 386, 387.

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respect of the loss of their ship—out of this 1000*l.*—350-1350ths of that sum, leaving the other fraction to be received by the underwriters. The appeal from that decision is brought by the underwriters, who have argued through their counsel that they are entitled to take the whole of the money which has been paid into Court in respect of the loss of the ship, because, they say, they have paid 1000*l.*, and that is the sum at which the value of the ship was fixed in the Admiralty proceedings. I take it that they mean that that must be treated as the true value of the ship as compared with the value in the policy, namely, 1350*l.*

The argument appears to be based upon this, that the underwriters, who have only partially insured this ship, are entitled when the ship has been lost and money recovered in respect of her loss against the wrong-doer—if they have paid an amount equal to the value of the ship so recovered in that action—to keep the whole of that money, and that no portion of it ought to be accounted for to the owners of the ship. A number of cases have been cited to us which to my mind do not really affect the question which we have to determine. Those cases were—*North of England Iron Steamship Insurance Association* v. *Armstrong* (1), *Burnand* v. *Rodocanachi* (2), *The Livingstone* (3), and *The Steamship Balmoral Co.* v. *Marten.* (4) None of those cases appear to me really to touch the question we have to determine. We are not here called upon to criticize *North of England, &c., Insurance Association* v. *Armstrong* (1) and to decide whether it is right as to what is the position of the underwriters and of the assured where more has been recovered than the amount of the policy, though it is to be observed that *North of England, &c., Insurance Co.* v. *Armstrong* (1) does not shew the facts in which that occurred.

What we have to determine is whether, where there has been a partial insurance—that is to say, an insurance where the amount which the underwriters are liable for is less than the amount which is expressed in the policy as the value of the ship—the underwriters are to take all that is recovered, provided

(1) L. R. 5 Q. B. 244.
(2) (1882) 7 App. Cas. 333.
(3) 130 Fed. Rep. 746.
(4) [1902] A. C. 511.

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it does not exceed the amount they have paid, or whether the owners and underwriters are to be treated as if there were to be a proportionate division of any benefits which are recovered.

I do not think it necessary to discuss the matter at any length, because the points put in the course of the argument really sufficiently deal with the matter; but it seems to me that it is desirable I should say this: that no authority cited to us directly bears upon the question, and, therefore, as far as this Court is concerned, it seems to me that the matter should be dealt with on principle. First of all there is some authority as to the position where there has been an abandonment to underwriters, which I think has a bearing upon the present case. In Arnould on Insurance, vol. 2, s. 1187, I find this: "It appears equally clear that where a ship is only partially insured, so that her owners remain to some extent 'their own underwriters,' the effect of a notice of abandonment will be to make the owners and the underwriters joint tenants of the property, in the proportion which the amount uninsured bears to the insured." Again, in s. 1215, the marginal note to which is "In cases of double or over-insurance," there is this passage: "On the other hand, the assured is considered to be his own insurer to the extent of the sum not covered, and is consequently entitled to that extent to his proportionate share in the proceeds of the salvage. Thus, suppose A. to have insured goods, the real value of which is 1000*l.*, for 800*l.*, of which sum B. subscribes for 500*l.*, and C. for 300*l.*; A., it is plain, stands his own insurer for 200*l.* A constructive total loss takes place, and A. abandons. If the proceeds of the salvage amount to 100*l.*, i.e., a tenth part of the whole insurable value of the goods, this must be distributed among the parties to the insurance in the proportion of a tenth of their respective interests, i.e., to A. 20*l.*, to B. 50*l.*, and to C. 30*l.*" That appears to me to state very clearly the principle that ought to be applied to a case where there has been an abandonment and salvage, and it seems to me that that principle—upon which the doctrine of subrogation is based—is applicable to the present case. The effect of the appellants' argument is that the assured on receiving the amount of 1000*l.* in effect placed the underwriters in the position of being subrogated to the whole of their

rights, which were fixed by the report of the registrar at 1000*l.* It seems to me, however, that when the underwriter pays the assured he is subrogated to his rights having regard to the risk he has taken—that is to say, in the present case, when the assured's name is used for the purpose of enforcing an action against the wrong-doer, the remedy is sought for the underwriter to the extent to which he had insured, and for the assured to the extent to which he had left himself uninsured. That being so, it seems logically to follow that when the money which is recovered is in hand it ought to be divided in proportion to the respective interests. That seems to me reasonable in principle, and, although there is no authority for it, it also seems to me to be analogous to the case of salvage where there is abandonment. That being so, it follows that the proportions which ought to be recovered in a case of this kind are easily ascertained; 1000*l.* was recovered from the wrong-doer, partly for the owner and partly for the underwriter, and therefore the proportion becomes 350-1350ths in the one case and 1000-1350ths in the other.

It only remains for me to say that I regard this case as one in which the position is precisely the same as if the assured had effected full insurance upon the ship, but with different underwriters—as if, for instance, he had insured his ship for 1000*l.* with the underwriters in question on a value of 1350*l.*, and had taken out another policy with another set of underwriters for 350*l.* on the same valuation. I cannot see what possible answer there could have been to the question: What is the division of the amount recovered from the wrong-doer between those two sets of underwriters? except that it must be in proportion to their respective interests. Is there any difference if the assured remains his own insurer with regard to the 350*l.*? I think not. He is entitled to his proportion just as much as his underwriters would have been if they had undertaken such a risk. That being so, I think the judgment of the Court below was right, and that the sum of 1000*l.* brought into Court in respect of the loss of the ship must be divided in the proportions I have mentioned.

As to the interest brought into Court on the 1000*l.*,

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the same principle applies, and that must be divided in the same way.

FLETCHER MOULTON and KENNEDY L.JJ. concurred.

Appeal dismissed with costs: cross-appeal allowed with costs.

Solicitors for the Dee Shipowners Mutual Insurance Association, Limited: *W. W. Wynne & Sons, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for the owners of the *Welsh Girl: Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

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April 16, 17.

S. (OTHERWISE G.) *v.* S.

Nullity of Marriage—Impotence—Pleading—Insincerity—Alleged Adultery of Petitioner—Materiality—Evidence—Practice.

In order to raise the question of insincerity in a suit for nullity, it is necessary that the answer should specifically allege it.

Adultery may be alleged, and, if established, is material matter for consideration on the question of the petitioner's insincerity.

The petitioner is, however, not bound to answer questions tending to establish adultery.

M. v. *D.*, (1885) 10 P. D. 175, not followed.

NULLITY SUIT.

The petitioner prayed for a decree of nullity on the ground of the alleged impotence of the respondent.

After the petition had been presented, the respondent (husband) filed a cross petition, praying for the dissolution of the marriage on the ground of the wife's alleged adultery with a person who was cited as co-respondent in that suit.

The parties were married in 1902.

The wife stated that the marriage had never been consummated; the husband said that marital intercourse had repeatedly taken place.

Shearman, K.C., and *Murphy*, for the petitioner.

Duke, K.C., Barnard, K.C., and *Bayford*, for the respondent.

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The petitioner was called and gave evidence in support of her petition.

In the course of the petitioner's cross-examination, Duke, K.C., put to her the following question in reference to the co-respondent in the husband's suit: "Had you during the month of July been meeting at various places in and about London the gentleman who was previously referred to (i.e., in the cross-examination)?"

Shearman, K.C., for the petitioner, objected to the question.

Duke, K.C. There is a reported case on the point: *M.* (otherwise *D.*) v. *D.* (1) In another and more recent case the matter was argued at some length, but that was upon an issue as to the legitimacy of a child, which the Court had directed to be tried: *Evans* v. *Evans and Blyth.* (2)

Bargrave Deane J. I should take upon myself, notwithstanding the case of *M.* (otherwise *D.*) v. *D.* (1) to hold that the question cannot be put. I do not think I am bound by that decision.

Shearman, K.C. Apart from that decision, there is a wider ground of objection. Even if the question can be put, the petitioner in any petition heard before this Court is not bound to answer any question tending to shew that he or she has been guilty of adultery: The Matrimonial Causes Act, 1857, s. 43. (3) Under the Evidence Amendment Act, 1869 (4), the witness is not liable to be asked—the question cannot be put; but under the earlier Act, even though the question were put, the petitioner could decline to answer.

Bargrave Deane J. I rule that the question is not admissible in this suit.

The respondent and other witnesses on his behalf having been called, evidence was tendered with a view to shewing that the

(1) 10 P. D. 175.

(2) [1904] P. 378.

(3) 20 & 21 Vict. c. 85. Note: Sect. 43 of the Matrimonial Causes Act, 1857, does not appear from the report to have been brought to the notice of the Court in *M.* v. *D.*, 10 P. D. 175.

(4) 32 & 33 Vict. c. 68.

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petitioner had been meeting a certain person (the co-respondent in the husband's suit) under circumstances indicating adultery, or from which adultery might be inferred.

Shearman, K.C., objected. If it is suggested that the evidence is relevant on the ground that it goes to disprove the sincerity of the petitioner, that question was disposed of in *G.* v. *M.* (1) It is also not open to the other side to give evidence of adultery with a view to shewing that adultery is consistent with the medical evidence and the signs of virginity.

Duke, K.C. The evidence is tendered in the exercise of a most painful duty, and is relevant on the question of the petitioner's bona fides. On the other point, the question is whether the lady's present condition is due to incapacity on the part of her husband or impediment on her part, and the evidence is relevant to that question.

[*Shearman, K.C.* There is no such plea.]

It is a necessary allegation on the lady's part that she is apta viro. She has to establish that affirmatively, and if she fails to do so, she fails in her suit.

Bargrave Deane J. The authority cited—*G.* v. *M.* (1)—was a Scotch case, and it is quite clear by the Scotch practice that no such defence as want of sincerity could have been raised in the Scotch Courts. The House of Lords were deciding an appeal upon a Scotch case. Therefore, the decision in that case does not apply unless you find in the judgments that the Law Lords did intend the principle to apply to the English practice.

We have had, since then, numberless cases in this Court, in which the question of want of sincerity has been raised and dealt with. But my belief is that in every case where want of sincerity has been raised it has been on a pleading and notice has thus been given to the other side that the question is to be raised; and, moreover, that it is intended to be raised on a certain statement of facts; that is to say, that the want of sincerity is not merely pleaded, but is pleaded with such particulars as to give notice to the other side in what respect there is said to be want of sincerity. In that Scotch

(1) (1885) 10 App. Cas. 171.

case, for instance, there was want of sincerity because the lady had a bastard child which it was said she wanted to get legitimatized. Now, in this case it is said that there is a want of sincerity—that the lady's object is not only, or chiefly, to get a decree of nullity, but more especially to avoid a decree against herself, or proceedings against herself for divorce, on the ground of misconduct; and it is now sought to bring before the Court, on the present pleadings, evidence to shew that she has committed adultery. Supposing I were to admit that evidence now, there is no issue raised on the pleadings in this case on which I can find anything. I cannot, upon these pleadings, find that she has committed adultery. I cannot find, upon the facts which might be so proved, that anything which happened points to her want of sincerity. But, more than that, having given no intimation to the other side that that was going to be done—that evidence pointing to her adultery was going to be offered—she is here without anybody to protect her. In a suit for divorce the co-respondent has to be made a party. Here no gentleman is made a party; no witness can be called to defeat the allegations which it is now proposed to make; and, altogether, this case would be mere brutum fulmen as far as this Court is concerned. For these reasons I take the technical ground that if this is to be raised it ought to have been pleaded, and, therefore, I shall not admit the evidence.

Duke, K.C., asked to amend the answer.

Bargrave Deane J. It is too late now.

Counsel then proceeded to address the Court on the evidence given in the course of the case, and, in the result,

The Court pronounced a decree nisi for nullity of marriage, with costs.

Solicitors for petitioner: *Lewis & Lewis.*
Solicitors for respondent: *Hamson & Powell.*

H. D. G.

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March 13, 18.

THE UNIVERSITY COLLEGE OF NORTH WALES AND THE UNIVERSITY OF WALES *v.* TAYLOR AND OTHERS.

Probate—Incorporation—Will and unexecuted Memorandum.

To effect the incorporation of an unattested document in a duly executed testamentary paper two things have to be established:—(1.) that the document was in existence when the will was made; and (2.) it must be referred to in terms which shew with sufficient distinctness that the reference is to an existing document, so as to enable the Court to determine without doubt that it is the instrument referred to.

It is not essential that the incorporating document should refer, in terms, to the unattested document as actually in existence.

Parol evidence is admissible to shew that the unattested document was in existence at the date of the will, and it is also admissible to enable the Court to place itself in the position of the testator at the time when he executed the incorporating document, for the purpose of construing and interpreting the testator's language and meaning; for every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare.

PROBATE SUIT.

The University College of North Wales and the University of Wales, as plaintiffs, claimed revocation of probate, which had been granted in common form, of a will dated June 27, 1905, and a document dated March 12, 1905; and they asked the Court to pronounce against the said document and to admit the will alone as valid.

The defendants were the executors, who had taken probate in common form, and the next of kin or legal personal representatives of the next of kin of the testator. They asked the Court to pronounce for the validity and in favour of the incorporation of the document of March 12, 1905, along with the will.

The Attorney-General was also a defendant. He pleaded that he was not sufficiently informed in reference to the matters alleged in the statement of claim, and did not admit the allegations therein contained.

The executors had issued an originating summons in the Chancery Division against the two universities, the next of kin, and the Attorney-General, asking for the directions of the Court as to

the two legacies of 10,000*l.* each which the testator purported to give to those two universities, but the hearing of that summons had been ordered to stand over until the present suit should have been disposed of.

It appeared that the two universities were incorporated on such terms as might, subject to the decision of the Chancery Division, raise difficulties as to the power to accept the legacies under the will if the same were to be subject to certain conditions impressed upon them by the express language of the document of March 12, 1905.

Previously to the will propounded the testator had made several other wills, the first of them dated in 1891 and the last on June 9, 1905; and by one of those wills, made early in March, 1905, he left legacies of 10,000*l.* each to the plaintiffs.

Shortly after the execution of the will of March, 1905, the testator wrote out the document which had now become the subject of litigation.

The document was as follows:—

"B. "March 12, 1905.

"To the Executors of my Will.

"Dear Friends,

"I desire to append a few observations expressing my views and opinions with respect to the bequests I have made to the 'University of Wales' and the 'University College of North Wales' Bangor. My chief object is and has been for several years to assist others in the work of Education and mental development of the youth of Wales and I believe there is a large fund of ability in the Welsh race which lies hidden under the surface and waiting only for opportunity to show itself. Much has already been done in this direction and much remains to be accomplished. For many years I have cherished the desire to take a share in this beneficial work and now by means of my will I put it in practical form with others in the efforts to secure and complete this truly National and Patriotic Policy. I fully concur with the terms of the bequests made by the late Dr. Isaac Roberts in his will recently disclosed so far as regards the extension of Education in every branch of knowledge to stimulate and encourage mental development and bring forth the latent

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or dormant ability of the youth of Wales. But I feel it my solemn duty to attach two conditions of a theological nature which shall be absolutely obligatory on every winner of a prize in any competition under this disposition as the foundation of the whole scheme viz. :—

"1. 'The belief in the existence of a Supreme Being, The Almighty All Wise and All Merciful God, Creator of Heaven and Earth, and all things therein Supreme Ruler and Governor of the Universe'

"And 2. 'The acceptance and belief in the tenets and principles of the Protestant faith'

"3. Every winner of a prize or scholarship in any competition hereby provided shall be a boy or young man of Welsh birth, born of a Welsh Father, a Welsh Mother, or both Welsh

"4. My name to be associated with each of these prizes or scholarship &c

"5. If the result of any examination does not satisfy or meet the requirements of the Examiners and the College or University Authorities the prize shall be withheld and offered on a subsequent occasion

"6. Candidates for examination by the Bangor College under this scheme shall all be males of Welsh birth as aforesaid and drawn from any secondary intermediate or Technical School under the full control of the County Councils of the six Counties of North Wales The length of time which a boy shall expend in study at any of these schools I leave to the discretion and judgment of the College Authorities

"7. Pupils entering on Higher Education and University Examination shall all be males of Welsh birth as aforesaid and drawn from any part of the twelve Counties of Wales and include the County of Monmouth which for all purposes of Education I consider to be a Welsh County."

On June 9, 1905, the testator executed a will in which no reference was made to the foregoing document.

Between the middle of June and the date of the last will the testator's solicitor had several interviews with the testator, the substance of which appeared in writing, which the solicitor produced in the course of his evidence.

The testator was extremely deaf, and questions and answers and other remarks were written down at the time of the interviews. The memorandum now in question was shewn to the solicitor at the interviews of June 21 and 22.

In the will, as prepared and executed, the following clauses, amongst others, appeared :—

"2. I bequeath all my personal estate and effects (except money and securities for money) to my trustees (free of duty) with the request and in the confidence that they will dispose of the same in accordance with any memorandum or paper signed or initialled by me and deposited with this my will or left among my papers at my death, but such memorandum shall not be deemed to form part of my will or to have any testamentary character; and the above expression of my wishes as to the disposal of such personal estate and effects shall not create any trust or legal obligation; and I further request my trustees, in the event of any part of my personal estate (except money and securities for money) not being comprised in such memorandum or paper to divide the same amongst my residuary legatees."

"7. I declare that if I shall subsequent to the date of this my will make any payments to any of the aforesaid legatees or institutions (as shall appear from any cheques, receipts, letters or other memoranda for or relating to any such payments in my handwriting or bearing my signature or initials or in my possession or deposited with this my will or left among my papers at my death or any entry or entries made by me in my ledger or any other book of mine) the same shall be in full satisfaction or in part payment as the case may be of the legacies to such legatees or institutions. And the decisions of my trustees or the majority of them shall be final and conclusive thereon."

Amongst other legacies (in clause 5 of the will) were the following :—

"10,000*l.* to the trustees for the time being of the University of Wales, of which His Majesty King Edward is the Protector, upon trust to invest the same and apply the income arising from such investments in founding in it new scholarships and prizes in my name to be held upon such terms and conditions

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and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto. And I direct my trustees as soon as conveniently may be after my decease to communicate to the said University of Wales the fact of this my bequest to such University the terms and conditions thereof and the rules and regulations relating thereto and the said University shall within six calendar months next after the same shall have been so communicated to them by my said trustees as aforesaid signify by writing under the hand of their President, Chancellor, Secretary or Registrar their acceptance of such bequest upon such terms and conditions and subject to such rules and regulations. And I declare that if the said University of Wales shall decline or refuse to accept the said bequest upon the aforesaid terms and conditions and subject to such rules and regulations or shall not within the said space of six calendar months signify to my trustees in manner aforesaid their acceptance of the same as aforesaid then the said bequest and every other legacy and bequest herein or in any codicil hereto contained in favour of the said University of Wales, shall be wholly null and void and I bequeath the same to the trustees for the time being of the University College of North Wales at Bangor upon the same trusts and in the same manner and under and subject to the same conditions in all respects as are hereinafter declared concerning the legacy of 10,000*l.* hereinafter bequeathed to such University College of North Wales at Bangor."

Then followed a bequest in similar terms in favour of the University College of North Wales at Bangor, and, in the event of non-acceptance of the legacy of 10,000*l.* so given, there was a gift over to the other University on like conditions.

As to the testator's residuary estate, subject to the payment of debts and funeral and testamentary expenses and the expenses incident to the execution of the trusts of the will and any codicil thereto, the trustees were directed to stand possessed of the surplus of the said residuary estate "As to one equal half part thereof upon trust for the trustees for the time being of the said University of Wales upon the same trusts and in the same

manner and under and subject to the same conditions in all respects as the aforesaid legacy of 10,000*l.* bequeathed to such University of Wales; and as to the other equal half part thereof upon trust for the trustees for the time being of the said University College of North Wales at Bangor upon the same trusts and in the same manner and under and subject to the same conditions in all respects as the aforesaid legacy of 10,000*l.* bequeathed to such University College of North Wales at Bangor."

Evidence was given to the effect that the last will was prepared on the footing that the document which it was now sought to incorporate was in fact the memorandum specified.

The onus of proof lay on the executors who were claiming probate of more than the plaintiffs.

Hammond Chambers, K.C., and *R. M. Middleton*, for the executors. *Allen* v. *Maddock* (1) is the leading authority, and lays down the principles to be applied in such a case as this. The evidence here shews that this document was in existence at the date of the will and identifies it as the document referred to in the will. The will need not state specifically that the document sought to be incorporated was then already in existence. [They also referred to *In the Goods of Smart* (2), and *Singleton* v. *Tomlinson.* (3)]

Barnard, K.C. (*Chester Jones* with him), for the next of kin, referred to Theobald on Wills, 6th ed. p. 67, and *Singleton* v. *Tomlinson.* (3)

Duke, K.C., *Bayford* and *Rayden*, for the University College of North Wales (plaintiffs). The will, in order to incorporate, must refer to the document as an existing paper. The reference in this will is too vague. The expressions "any memorandum," "amongst my papers," and "are contained" might all apply to a future, and do not necessarily apply to a then existing, paper. This memorandum could not refer to the will of June, but must refer to the will of March, which also contained bequests to the two universities. The memorandum does not mention

(1) (1858) 11 Moo. P. C. 427. (2) [1902] P. 238.
(3) (1878) 3 App. Cas. 404, at p. 414.

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scholarships or prizes. If the memorandum is vague, parol evidence is not admissible: *Smart* v. *Prujean* (1); *In the Goods of Yockey* (2); *In the Goods of Lady Truro* (3); *In the Goods of Sunderland* (4); *In the Goods of Watkins* (5); *In the Goods of Dallow* (6); *Van Straubenzee* v. *Monck* (7); *In the Goods of Mary Reid* (8); *Durham* v. *Northen.* (9)

Sir D. Brynmor Jones, K.C., for the University of Wales.

Rowlatt, for the Attorney-General.

Cur. adv. vult.

March 18. SIR GORELL BARNES, PRESIDENT. The question which has to be determined is whether the memorandum is incorporated with the will. There are certain difficulties affecting the position of these two universities, and benefits may result to the next of kin from those difficulties, in the event of the memorandum being incorporated; but that is a matter which does not concern this Court, which has to deal with a question of construction only.

The question depends upon the proper application of certain well-known principles, which have often been the subject of notice in the Courts, both before and since the Wills Act, 1837 (1 Vict. c. 26). This case does not raise any new point to my mind; it only raises, when one comes to the end of a somewhat lengthy statement of the facts, a question of construction. It is necessary to see what are the proper principles to be applied.

In one of the cases, which is really the leading case on the subject, two or three passages in the judgment occur which state those principles. The case is *Allen* v. *Maddock* (10), and one such passage reads: "Before the Act for the amendment of laws with respect to wills, 7 Will. 4 & 1 Vict. c. 26, was passed in the year 1837, no formalities of any kind being necessary in the execution of a will or codicil as to personal

(1) (1801) 6 Ves. 560.
(2) (1873) 29 L. T. 699.
(3) (1866) L. R. 1 P. & M. 201.
(4) (1866) L. R. 1 P. & M. 198.
(5) (1865) L. R. 1 P. & M. 19.
(6) (1866) L. R. 1 P. & M. 189.
(7) (1862) 3 Sw. & Tr. 6.
(8) (1868) 38 L. J. (P. & M.) 1.
(9) [1895] P. 66.
(10) 11 Moo. P. C. 427, 439.

estate, the effect of a well-executed testamentary instrument upon one not well executed could hardly come before a Court of Probate. But such questions arose very frequently in the temporal Courts with respect to the disposition of real estate, and the statute alluded to having placed wills as to real and personal property on the same footing, it should seem that the authorities upon this point with respect to real estate, whether before or since the statute, in Courts of law, are now equally applicable in the Court of Probate with regard to personalty."

Further on the judgment proceeds as follows (1): "The cases to which we have referred all turned upon instruments anterior to the late Wills Act; but they shew that before that Act, in order to give validity against real estate to a testamentary instrument previously ineffectual for the purpose, such a general reference was sufficient as, when compared with the evidence produced, would enable the Court to identify the document." . . . . "As to the certainty of the reference required by the law in the incorporating instrument, there does not seem to be much distinction, under the Statute of Frauds, between a will and any other instrument. In either case it is necessary, and it is sufficient, that the description should be such as to enable the Court, when the evidence is produced, to say what is the instrument intended."

And again (2): "A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose."

By the Wills Act the mode in which a will was to be executed is altered; but the principle as to what papers are to be held included or excluded is left untouched. The result of this state of the law is that, both before and since the Wills Act, "when there is a reference in a duly executed testamentary instrument

(1) 11 Moo. P. C. at p. 452. (2) Ibid. at p. 454.

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The President.

to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that in the existing circumstances there is no doubt as to the instrument it is no objection to it that by possibility circumstances might have existed in which the instrument referred to could not have been identified."

Two things, then, have to be established—first, the document must be existing when the will was made; secondly, it must be referred to in terms which shew that the reference is made with sufficient distinctness to an existing document, so that the Court may be able to say without doubt that it is the instrument referred to.

The first of these questions is purely one of fact; the other, when the facts are ascertained, is to my mind merely a question of construction.

On the first point, parol evidence must clearly be admissible; on the second, the extent to which it is admissible is well known, and, in my opinion, cannot be stated better than in Wigram on Evidence, 1858, 4th ed. p. 88 (proposition V. par. 96): "Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare."

That statement to a certain extent applies to such a case as this. The Probate Court is to some extent a Court of construction, in that it has to determine whether a document referred to is testamentary and entitled to probate.

That being the state of the law, I do not think that the authorities cited are of much assistance, because not one of them deals with this matter on any other footing than upon the principles I have stated and upon the facts ascertained by evidence given before the Court. The question in each case turns upon the application of the principles to the particular facts of the case. [The learned President stated the facts hereinbefore set forth, and then proceeded:—] The matter, although it has taken a long time to state, is really confined to the proper construction to be placed upon these few words "upon trust to invest the same and

apply the income arising from such investments in founding in it" (i.e., the university) "new scholarships and prizes in my name to be held upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto."

The arguments put forward on behalf of the executors and next of kin is that the letter to the executors is the memorandum referred to and that it is incorporated with the will. On the other side it is contended that it is not so identified and incorporated.

In my opinion the document is incorporated; and the reasons may be very shortly stated. It appears to be a document which was undoubtedly in existence at the time the will was made; it was a subject of discussion before the will was made; and it fulfils in every respect the description to be found in the words of the will.

It was argued by Mr. Duke that the letter does not fulfil the description given in the will because it does not refer to scholarships or prizes, but this argument does not sufficiently take into account the 3rd and 4th clauses of the letter or memorandum.

I have no doubt, sitting as it were in the chair of the testator, that this document does relate to the scholarships and prizes to be founded in the testator's name. Then there is no doubt that the document was written by the testator, thus fulfilling another condition. Another condition is that it was to be found amongst the papers of the testator, and one cannot avoid noticing the different language used in clauses 2 and 7, where the words are "among my papers at my death." The words "amongst my papers" in the will mean nothing more than in my possession. Mr. Duke laid stress upon the vagueness of the word "any" in connection with the word "memorandum," but I feel very little difficulty about that point. The word "any" has been construed in *In the Goods of Stewart* (1), and in that case the document was held to be incorporated.

As to the words "are contained," I quite agree that it would be possible to construe them in the future sense if the facts rendered

(1) (1863) 3 Sw. & Tr. 192.

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The President.

it necessary so to do; but in the present case I do not think they do. One of the passages which I read from the judgment in *Allen* v. *Maddock* (1) deals with that, and it all comes back to the point whether the document which it is sought to treat as incorporated is referred to in terms which shew that reference is made with sufficient distinctness to an existing document, so that the Court can say without doubt that it is the instrument referred to. Every word of description is fulfilled, and when one considers that the wishes of the testator were discussed with persons about him and that the document was then in existence, I feel no doubt whatever that this document ought to be incorporated, and that the grant in common form was rightly made and the probate must be handed out to the executors.

I think that the litigation might have been avoided if the testator had taken the trouble to identify the document, in more precise terms, at the time when he executed his will. There will be an order for costs of all parties out of the estate—that is to say, the executors, the Universities, and the next of kin—but the Universities will take one set of costs only.

Solicitors for plaintiffs: *Faithfull & Owen, for J. Glynne Jones, Bangor.*

Solicitors for executors: *Chester, Broome & Griffithes, for Jolliffe & Jolliffe, Chester.*

Solicitors for next of kin: *Kennedy, Ponsonby & Ryde.*

Solicitor for the Attorney-General: *The Treasury Solicitor.*

(1) 11 Moo. P. C. 427.

H. D. G.

In the Estate of HESTER HARVEY.

1907
March 18.

Probate—Practice—Conduct Money—Court of Probate Act, 1857 (20 & 21 *Vict.* c. 77), *s.* 26.

Upon a motion to attach a person for not complying with an order made under s. 26 of the Probate Act, 1857, directing his attendance in Court for cross-examination as to his knowledge of a certain testamentary paper:—

Held, that the motion must be refused, no conduct money having been tendered.

This was a motion to attach one A. H. for not obeying an order which had been made under s. 26 of the Probate Act, 1857, directing him to attend in Court for the purpose of being examined touching his alleged knowledge of a certain testamentary paper.

Sir Gorell Barnes, President. Has conduct money been paid or tendered?

Willock, for the applicant. It is not necessary: *In the Goods of Wyatt.* (1)

Sir Gorell Barnes, President. In the case you cite the matter was not considered very carefully, the person being, in fact, actually present in Court.

But in *Townend* v. *Townend* (2), which was a motion to attach

(1) [1898] P. 15.

(2) Townend *v.* Townend.

July 10, 1905.

Motion to attach the respondent (husband) for disobeying an order directing him to attend at the Divorce Registry for examination as to his means. The wife (petitioner) had no separate estate.

Barnard, K.C., and *Willock*, on behalf of the respondent put forward the technical objection that conduct money ought to have been paid or tendered to him when he was served with the order. In a case affecting the liberty of the subject, every technicality might properly be raised. A registrar was to be treated as standing in the same position as an examiner of the Court. In regard to the payment of conduct money, the right to which is recognized in the statute 5 Eliz. c. 9, s. 12, and was further dealt with in 15 & 16 Vict. c. 86, s. 38, and again in 17 & 18 Vict. c. 34, s. 4, such an order as that now under discussion must be taken to be upon the same basis as a subpœna. [They referred to *Stuart* v. *The Balkis Co.*, (1884) 53

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a respondent for not obeying an order which I had made after a decree of divorce directing him to attend for cross-examination before one of the registrars touching his means, the point as to conduct money was raised and argued, and the motion for attachment was dismissed. As conduct money has not been tendered in this case, I cannot accede to the application for attachment.

[It appeared from the affidavits that A. H. had recently handed the will to his solicitor, but refused to sign the necessary papers to enable the solicitor to apply for probate.]

Willock applied that the solicitor for A. H. should be ordered to lodge the will in the district probate registry at Bristol. The solicitor will probably do all that is required if he is protected by an order of the Court.

SIR GORELL BARNES, PRESIDENT. I do not think the solicitor has any privilege whatever in this matter, looking at the words of the section which deals with the obligation to bring in a testamentary paper. The will does not belong to the client, but to the Court. You may take the order you now ask for.

Solicitors for applicant: *Pitman & Sons, for Fairfax Spofforth, Bristol.*

L. J. (Ch.) 791; *In re The Diamond Fuel Co.*, (1878) 22 Sol. J. 914; *Protector Endowment Co.* v. *Whitlam*, (1877) 36 L. T. 467; *Taylor* v. *Roe*, (1893) 68 L. T. 213; *Brocas* v. *Lloyd*, (1856) 23 Beav. 129; *Davey* v. *Durrant*, (1858) 24 Beav. 493; and R. S. C., Order XXXVII., r. 9.]

C. W. Mathews (*Durley Grazebrook* with him), for the petitioner, in reply, urged that the respondent had no merits and no bona fides. This was a matter between the Court and the respondent, and not merely between party and party. This was not an ordinary witness, but a guilty respondent, who had admitted means since the suit began and afterwards said he had none.

SIR GORELL BARNES, PRESIDENT, said that he had come to the conclusion that conduct money was payable when the Court ordered the attendance of a witness for examination. Therefore, the technical objection must prevail and the motion must be dismissed.

Solicitors for the wife (petitioner): *Calkin Lewis & Stokes.*

Solicitors for the husband (respondent): *Sims & Syms.*

H. D. G.

JUDD *v.* JUDD.

1907
April 23;
May 13.

Divorce—Practice—Magistrate's Order for Separation on the Ground of "persistent Cruelty"—Wife's Petition for Divorce—Absence of verbal Corroboration of Cruelty.

It is the practice of the Court to require corroboration of the petitioner's evidence as to cruelty, and the mere production of a certified copy of a separation order previously made between the husband and wife by a Court of summary jurisdiction on the ground of his persistent cruelty is not, as a general rule, to be considered a sufficient corroboration.

The Court may, however, in an exceptional case, relax this rule of practice where the evidence of the petitioner accounting for the absence of the witnesses who corroborated her when before the magistrate, and the general circumstances of the particular case, coupled with the production of a certified copy of the conviction, commend themselves to the Court as satisfactory and sufficient.

This was an undefended petition by the wife, suing in forma pauperis, praying for the dissolution of her marriage on the ground of the cruelty and adultery of her husband.

No question arose as to the adultery, which was duly proved.

As to the cruelty, the petitioner, in the course of her evidence, stated that her husband had violently assaulted and struck her on divers occasions, and that after the last of these assaults, of which she gave details, she ceased to cohabit with him and took out a summons under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), on the ground of his "persistent cruelty" towards her, which, on August 16, 1901, resulted in a finding in her favour and a separation order, a certified copy of which the petitioner produced.

The petitioner further stated that two witnesses had been called before the magistrate, and that they had corroborated her as to some of the latest acts of cruelty, but that one of these witnesses had, she was informed and believed, left this country, and the other had left the district and could not be traced, mainly owing to lack of funds on her (the petitioner's) part to enable her to carry out any exhaustive search.

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Durley Grazebrook, for the petitioner, asked the Court to accept the evidence of the petitioner coupled with the production of the certified copy of the order, founded on the finding of " persistent cruelty " by a stipendiary magistrate. This Court not infrequently accepts the evidence of a petitioner as to desertion, and, although no doubt the practice is to require some corroborative evidence to be given before this Court as to cruelty, there is no rule of law to that effect, and the practice may reasonably be relaxed in an exceptional case, where, but for such relaxation, serious hardship on a poor petitioner might ensue.

BARGRAVE DEANE J. The point is of importance, and there does not appear to be any reported decision upon it. I will speak to the President, and will consider the practice to be followed in future.

Cur. adv. vult.

May 13. BARGRAVE DEANE J. This case came before me on April 23, and I reserved my judgment on the question of cruelty. The difficulty arose through the petitioner (wife) being unable to bring before me any witness to corroborate her as to the cruelty which she deposed to. All she was able to do was to put in a certified copy of a separation order made by a magistrate founded on " persistent cruelty."

The petitioner, in her evidence before me, stated that her husband on several occasions in June and July, 1901, assaulted her, and she went into particulars. She said that in consequence of the last of those assaults she left her husband and summoned him before the stipendiary magistrate at Cardiff, and that upon the hearing of the summons she called two witnesses, who corroborated her, and that the magistrate thereupon granted her a separation order under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of " persistent cruelty."

I am satisfied in this case that the respondent was guilty of persistent cruelty to his wife, and I am satisfied that witnesses were called to corroborate her on that occasion.

Mr. Lewis, the stipendiary magistrate at Cardiff, who heard the summons, is a very competent lawyer, who practised for a

considerable number of years at the bar, and is thoroughly acquainted with the principles which should guide the Courts in dealing with cases of this kind.

Therefore, in this particular case, I accept the certified copy of the order, because I feel it to be a decision of a well-qualified Court; and with the duly certified copy of that order, coupled with the petitioner's evidence before me, I find that the respondent has been guilty of cruelty to the petitioner. The adultery was duly proved at the hearing, and no question arises as to that part of the case.

The point raised as to the sufficiency of the evidence of cruelty has not, so far as I am aware, been raised and decided before, and I reserved judgment upon it because I thought it right to consult the President before giving my decision.

It must not be taken that in cases of cruelty this Court will be satisfied with the mere production of a certificate of conviction or order for separation founded on a finding of "persistent cruelty" before a Court of summary jurisdiction, and the reason will be apparent to anyone's mind. In every case before this Court where cruelty is alleged it is for this Court to be satisfied, upon evidence given before it, that the charge of cruelty in the petition is established. It does not necessarily follow that the evidence given before a Court of summary jurisdiction will be satisfactory to this Court. This is shewn by the fact that this Division, sitting as a Divisional Court, is constituted a Court of appeal from the decisions of Courts of summary jurisdiction under the Matrimonial Causes (Married Women) Act, 1895, on questions of fact as well as upon points of law; and in some cases of appeal we have quashed convictions because we thought that the Courts of summary jurisdiction were not justified in arriving at their decisions.

Being satisfied that the petitioner cannot obtain the attendance in this Court of witnesses who corroborated her when before the magistrate, there is no rule of law which precludes me from acting in the absence of either of those witnesses.

In the present instance, as I have said, the absence of the witnesses who were called before the magistrate has been accounted for by the petitioner; and, accepting her evidence,

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I hold it to be sufficiently corroborated by the certified copy of the magistrate's order. I pronounce a decree nisi, with such costs as are recoverable in a pauper case.

Solicitors: *Williamson, Hill & Co., for E. W. Pocock, Cardiff.*

H. D. G.

C. A.
1906
Jan. 16.
1907
March 12.

[IN THE COURT OF APPEAL.]

THE TACTICIAN.

Admiralty—Collision—Compulsory Pilotage—Assistance from Master.

The pilot in charge of a ship is entitled to the active assistance of the master, not by way of interfering with the navigation, except in cases of manifest incapacity, but in pressing upon his attention such a matter as the nature of the lights of another vessel, about which the pilot has apparently formed a mistaken opinion involving possible risk.

APPEAL (1) by defendants, owners of the *Tactician*, in an action of damage by collision, against a decision of Bargrave Deane J. in favour of the plaintiffs, owners of the *Leander*.

The case is reported on the question of the amount of assistance, short of interference, which the master is bound to afford the pilot compulsorily in charge of his ship.

The facts sufficiently appear from the following judgment delivered January 16, 1906 :—

BARGRAVE DEANE J. This is a collision which took place on the night of November 24, 1905, at the mouth of the river Thames, about half-past ten, between the *Leander*, a steam vessel of 2793 tons gross register, and the *Tactician*, a steamship of 4765 tons net, and probably between 7000 and 8000 tons gross tonnage, and the sole question in the case really is whether in addition to the pilot there is any blame attaching to the officers of the *Tactician*.

I will clear away at once the only point which is made against

(1) Heard, by consent, by two judges of the Court of Appeal, with nautical assessors.

the *Leander*, viz., that they might have done something. It is entirely a question of seamanship as far as I understand, and, as I said I would do, I consulted the Elder Brethren, and they are of opinion that there was nothing which ought to have been done by those on board the *Leander* which they neglected to do. It is suggested that they might have sounded the whistle. The Elder Brethren think that might have been misleading, and with regard to sounding the bell, that is not one of the things that they would recommend, and they say in their opinion no blame attached to the *Leander* for not making some signal. She was at anchor. The pilot of the *Tactician* is undoubtedly to blame, and therefore I will not trouble myself to deal with him at all.

The *Leander* was at anchor, as I find as a fact, somewhere about three or four cables lengths to the eastward and southward of the Black Deep lightship. It is not very material exactly where she was, but in our opinion she was well away on the starboard side of the fair way of vessels coming up channel heading S.W., and she had her two riding lights burning. The *Tactician* was bound on a voyage from Calcutta to London, and she passed the Edinburgh lightship, leaving it on her starboard hand, and proceeded on. The first question which occurs to me as material is the place where, after passing the Edinburgh lightship, she first starboarded. Those on board of her say that she starboarded from one to two cables lengths after passing the Edinburgh lightship. I do not believe she did. I think that she kept on her proper course, keeping on the starboard side of the channel, and that she did not starboard, as they say she did, so as to pass close to the Gas buoy, which is on the south side of this channel. It would be taking her out of her proper course, and, for a reason I will give at once, I think it is clear she did not at that time starboard. Soon after passing the Edinburgh lightship, according to the evidence of the second officer who was on the bridge of the *Leander*, she was noticed coming up from the Edinburgh lightship; he noticed her when she passed the Edinburgh lightship, because he says her funnel had crossed the light for a moment, and he kept observing and he kept seeing her port light, and he kept her

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port light in view until very shortly before the collision. Those on board the *Tactician*, the pilot and master and third officer, who were all on the bridge, agree in this, that when the lights of the *Leander* were reported to them, and they saw them, the light of the Black Deep lightship was between the two white lights of the *Leander*, and that the lightship's light kept there. Now the best test that can be given as to where I am to find the truth of this story is that fact. If those on board the *Tactician* thought that the vessel whose two lights they saw was a vessel moving, as they thought, across their bows, they must have been going at a right angle course, approximately to that vessel, to have kept the lightship light between the two lights of the vessel they saw, otherwise, if they were moving away to the port side of that vessel under a starboard helm so as to pass green to green, it is impossible that that lightship's light could have kept in that position. The two vessels must be going approximately at about the same speed, at an angle like that, to keep a light exactly in the same position between the two lights of a vessel across them. In my opinion, therefore, the story told by those on board the *Tactician* is not accurate, that they were keeping an observation on this vessel when they say that they saw the vessel keeping the lights in this particular position with regard to the Black Deep light. In my opinion the *Tactician* did not see those lights when she says she saw them. In my opinion the *Tactician* kept up on her proper course after passing the Edinburgh lightship, a great deal further to the northward and westward than those in charge say they did, and did not notice the lights of the *Leander* until they got a great deal closer to her. When I look at the story told here and the story told in the pleadings and in the deposition of the master and in the log, it is very difficult to believe that the story that has been told here, about a green light and about the conversation with regard to it, is a story which was not brought into being somewhere about the time that the pilot came to London and communicated with the master, and the master went and had a conversation with him, or he came and saw the master, and they had a conversation in London. It is a very unpleasant incident in this case that this meeting should have been arranged by appointment

before this case came into Court and before the evidence was given. However, there it is.

The second officer of the *Leander* says that this vessel's port light continued in view until very shortly before the collision, and that "we were on his port bow until he starboarded and very nearly cleared us." The story of the *Tactician* is an impossible story. If, when they saw the *Leander's* lights, starboarding as they say they did, shortly after passing the Edinburgh lightship, they never could have touched the *Leander*, never could have gone near her; therefore this story is an impossibility, and I am driven back to the story told by the *Leander*, which is consistent with the facts of the case as now known, viz., that the *Tactician* never was with the *Leander* on her starboard bow, until she starboarded shortly before the collision. That being so, the question arises, What were the master and third officer doing on board the *Tactician?* I have got the story of this dim light that was seen; I have got the fact told by them that they noticed that on the course they were going the two lights of the *Leander* did not move as regards the Black Deep lightship, and they say that went on for some minutes. The Elder Brethren, who advise me in this matter, say that there was a very strong duty on the part of the master—not perhaps on the part of the third officer, because he was subordinate, but on the part of the master—to have brought the attention pointedly of the pilot to the fact that he must be mistaken in thinking that the glimmer of these lights which he saw were the lights of a crossing vessel or moving vessel, and should have pointed out that these lights were not shifting, and that by the fixed light of the Black Deep it was perfectly certain that the vessel was at anchor; and it does not do for a master, with regard to this, to say, as he did say in his evidence, this—I will read his words, "I was anxious about these lights; I had no power to interfere with the pilot." That is a wrong view of his duty. The master connot be heard to say, "When a pilot is in charge of my vessel I am free from the necessity of calling his attention from time to time to things which, in my opinion, are material and important to him." As the officer in charge of this vessel it was his duty to call the attention of the pilot from time to time to what he believed to be

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an error of judgment, and he is not entitled to fold his arms and say, "I have no responsibility towards the pilot in charge of my ship."

In this particular case it is quite clear that the master saw grounds for anxiety.

He has chosen to say, "I thought the pilot was in charge, and I have no right to interfere with him."

I think he is wrong, and I think if the master had done his duty in this particular case he would have forcibly called the attention of the pilot to the fact that the lights were clearly stationary lights, and that they were not the lights of a vessel that was moving.

If he had done that, the pilot would have starboarded very much earlier, and there would have been no collision.

On this ground I am of opinion, and the Elder Brethren agree with me, that the master of the *Tactician* was very much to blame in not calling the attention of the pilot more than once to the fact that these lights were stationary lights, and that the pilot was mistaken in his judgment. If he had done so, and the pilot had still insisted, the matter would have been different. He did not do his duty in calling the pilot's attention, and therefore did not give the pilot that assistance which the pilot was entitled to have from the master.

That is really the main point in this case, but there are one or two other matters which have been mentioned which I will deal with. One is the question whether this vessel, the *Leander*, was in the usual place, and whether those on board the *Tactician* might not have been misled by what they saw. The Elder Brethren advise me that in the river Thames you must never expect to find that vessels are not at anchor. Anything may happen to a vessel proceeding out to sea, or coming up from sea, which may cause her to anchor in any particular place. You must never be surprised, in an estuary like the Thames, to find vessels at anchor in any particular spot; and one of the Elder Brethren has told me that he himself has often, from necessity, been obliged to anchor in one of these channels where vessels are constantly passing. This was in the vicinity of a lightship, and very often vessels are brought up near a lightship for

purposes connected with the Trinity House; there might have been a Trinity vessel anchored close to this lightship on duty. In coming up any of these channels it is not right to assume that, if you see a light, it is or is not a vessel at anchor because you are accustomed or not accustomed to see a vessel at anchor in that particular spot.

Therefore the argument, which counsel for the defendants have used with some force, in our opinion has no effect in this particular case.

The case I think, as far as I am concerned, is clear. In my opinion this collision was caused by the default of the pilot, but it also might, in my opinion, have been avoided if the master of the *Tactician* had done what I conceive to be his duty in giving his advice and his opinion to the pilot on this particular occasion, and that by failing to do that he did not do his duty, and did not assist the pilot as the pilot ought to have been assisted, and therefore I find that the master is to blame as well as the pilot.

1907. March 12. *Sir Robert Finlay, K.C., Aspinall, K.C.*, and *F. E. Smith*, for the appellants, the owners of the *Tactician*. The learned judge in the Court below has held that, though the pilot compulsorily in charge was to blame for the collision, nevertheless the owners of the *Tactician* are liable on the ground that the master of the vessel ought to have remonstrated more with the pilot as to his mistaken view on the subject of the lights of the *Leander*. It is, however, submitted that to encourage interference with the pilot in the performance of his duties would lead to grave and disastrous consequences. In *Hammond* v. *Rogers* (*The Christiana*) (1) Parke B., delivering the judgment of the Privy Council, lays down that to the pilot "belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only." In *The Argo* (2) Dr. Lushington refers to the approval by the Privy Council in the above case of his views on this point, and adds that "a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does

(1) (1850) 7 Moo. P. C. 160, at p. 171. (2) (1859) Swa. 462, at p. 464.

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not foresee, or in cases of great necessity." In *The Peerless* (1) the same learned judge said: "There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering we should have a double authority on board, a divisum imperium, the parent of all confusion, from which many accidents and much mischief would most surely ensue." Here the master did discuss the matter with the pilot, and the pilot insisted that there was a green light, in which case the course steered by the pilot would have been right.

[Reference was made to *The Duke of Manchester* (2) and to *The Oakfield.* (3)]

Laing, K.C., and *Dawson Miller* (*Rufus Isaacs, K.C.*, with them), for the respondents, the owners of the *Leander*, were not called upon.

LORD ALVERSTONE C.J. Notwithstanding the very able argument of counsel for the appellants, I do not see my way to interfere with the judgment of Bargrave Deane J. The cardinal principle to be borne in mind in these pilotage cases, that raise difficult questions of law, and very often difficult questions of fact, is that the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing, and everything of that kind, are for the pilot; and I entirely agree, if I may say so, with great respect, with the opinions of the very learned judges, from Dr. Lushington downwards, to which attention has been called, as to the danger of a divided command, and the danger of interference with the conduct of the pilot; and that if anything of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage. I do not wish to put it stronger than it is put in the passages that have been cited, and I do not think that counsel for the appellants have in any way over-stated the importance of that principle. But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out,

(1) (1860) Lush. 30, at p. 32.
(2) (1846) 2 W. Rob. 470, at p. 478; on appeal, (1847) 6 Moo. P. C. 90.
(3) (1886) 11 P. D. 34.

and a well-found ship. I agree with the appellants' counsel that the cases in which the master has to interfere at all with the pilot very rarely occur, but I think the passages they have cited from the cases shew that there is, or may be, a distinction between interference and bringing to the pilot's notice anything which the pilot ought to know. The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important that he should know.

I do not quite take the view that the lights of this vessel were properly reported. If there really was a green light visible, that green light was not reported, and very great difficulty would have arisen if there had been any green light in view. Of course, it is perfectly obvious that no green light was shewn from the *Leander*. In those circumstances I think the first thing we have to consider is: Was the master informed by the pilot that he had seen a green light and was confident that the vessel was going down channel? Looking at the judgment of Bargrave Deane J., I am not at all satisfied that he believed that part of the story. He comments pointedly upon the absence from the statement before the Receiver of Wreck of any reference to a green light at all, or any reference to the pilot having seen a light which he thought was a green light. Speaking for myself, I must say I should have had much more doubt about the case if I had believed the story that the pilot had said he saw a green light, and there was such a state of things as was consistent with the pilot having seen a green light for any appreciable time. I should take the view, however, on this evidence, that the master's story that the pilot told him he had seen a green light, and was confident it was a green light, was not true. I cannot conceive such a thing. I cannot but think that that part of the case was disproved before the master gave his evidence in Court. Now, quite apart from that, one must for a moment look at what are the admitted facts of the case. The course which counsel for the appellants have marked upon the chart, and which is the course I had in my mind marked off, is substantially straight for the Black Deep lightship. The idea of the pilot was to go

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fairly close to the Shingles buoy before shaping a course up into the river Thames. She was a vessel going eleven knots. The tide, apparently, had not very much effect upon her. It does not make much difference, because the admitted facts are that for a period of nine to ten minutes at least two white lights were seen forming a rough triangle on either side of the Black Deep light. Whatever variation there was in those lights, it never was enough to take the Black Deep light outside either of those two lights. *The Tactician* keeps on her course, it may have been for over a mile, and all the time she had the Black Deep light inside those two white ights. We are advised—and we have come to the conclusion by our unassisted knowledge of the matter—that a very small portion of those nine minutes would be sufficient to satisfy any competent man that the idea that those two lights were on a moving vessel, bound in any direction, must be a mistake. Under those circumstances the only thing that is put against that fact being called to the attention of the pilot is that there was some conversation, even if it took place, as to the light which the pilot thought was a green light and the master thought was not. If it took place it falls far short of the pilot saying, "I am confident it is a green light." Then, would it have been a breach of the principle laid down in the various authorities to have said to the pilot, without strong language or with it, "You must be mistaken. Look, those lights have kept ahead of us for three or four minutes." I think that is what Sir James Hannen in *The Oakfield* (1) recognized when he pointed out that notice—I will not use a word so high as "remonstrance," because it might be thought that remonstrance involved interference—that notice and suggestion are not that interference of which the danger has been pointed out by Dr. Lushington.

I do not know that I should have framed my judgment quite in the same way; but in substance I entirely agree with the judgment of the learned judge. I do not know that I should have spoken of "responsibility towards the pilot," but in my opinion the pilot did not have all the assistance he was entitled

(1) 11 P. D. 34, at p. 36.

to have from the competent man beside him; and any competent master would have appreciated that it was not a moving vessel, and ought to have called the attention of the pilot to the fact. If he had, he would not be in any way interfering with the pilot's command. This appeal, therefore, must be dismissed.

Fletcher Moulton L.J. I am of the same opinion, and for the same reasons. I do not think this case raises in any way the question of the duty of the master not to interfere with the authority of the pilot, but I think that just as the pilot is entitled to the assistance of the master and crew of the ship in obtaining information as to the surrounding circumstances, so in the present case he was entitled to the assistance of the master in calling his attention to the fact that the inferences he was drawing from the surrounding circumstances were such as a competent mariner ought not to draw. It was impossible for the master to see the Black Deep light stationary between the two white lights of the steamer for so long a time without realizing, if he was a competent mariner, that the ship must itself be stationary; and inasmuch as the action of the pilot shewed that he was not drawing that conclusion, it was the duty of the master at all events to call his attention to it and put prominently before his mind the very questionable character of the course that he was pursuing.

Appeal dismissed.

Solicitors for appellants, owners of the *Tactician: Pritchard & Sons, for Simpson, North, Harley & Co., Liverpool.*

Solicitors for respondents, owners of the *Leander: Thomas Cooper & Co.*

T. L. M.

C. A.
1907
March 23, 25.

[IN THE COURT OF APPEAL.]

THE HOPPER No. 66.

Admiralty — Collision — Limitation of Liability — Charterer by Demise — "Owners" — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 71.

Charterers by demise are not "owners" within the meaning of s. 503 of the Merchant Shipping Act, 1894, and, therefore, cannot, under that section, claim the benefit of limitation of liability in respect of loss or damage caused by the improper navigation of the ship by their servants [but see now s. 71 of the Merchant Shipping Act, 1906].

APPEAL by plaintiffs, Sir John Jackson, Limited, in an action of limitation of liability, against a decision of Bargrave Deane J., holding that they, as charterers by demise of the *Hopper No.* 66 —which was to blame for a collision caused by the negligence of their servants—were not entitled to claim the benefit of limited liability under ss. 503, 504, of the Merchant Shipping Act, 1894.

The case was tried on December 4, 5, and 21, 1905. The facts, the sections of the Act, and the judgment are fully set out in the report in the Court below. (1) On December 21, 1906, the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), was passed, and came into force on June 1, 1907. By s. 71, ss. 502—509 of the principal Act (that is, the Merchant Shipping Act, 1894) "shall be read so that the word 'owner' shall be deemed to include any charterer to whom the ship is demised." The contention of the appellants was that charterers by demise were already included by implication in s. 503 of the Act of 1894.

March 23. *J. A. Hamilton, K.C.*, and *Dawson Miller*, for the appellants (plaintiffs), Sir John Jackson, Limited.

Aspinall, K.C., and *A. D. Bateson*, for the respondents (defendants), the owner of the *Blanche*, and others.

The arguments were the same as in the Court below (2), but the following additional cases and statutes were referred to:

(1) [1906] P. 34. (2) [1906] P. 34, at pp. 37—42.

Trinity House v. *Clark* (1); *Meiklereid* v. *West* (2); *Hughes* v. *Sutherland* (3); 31 & 32 Vict. c. 119, s. 16; 34 & 35 Vict. c. 78, s. 12.

March 25. SIR GORELL BARNES, PRESIDENT. This is an appeal from a decision of Bargrave Deane J. giving judgment for the defendants in a limitation suit.

It appears that on November 30, 1904, the steam *Hopper No.* 66, whilst proceeding from the Langton Dock, Liverpool, to sea, with a load of excavations, came into collision with the steamship *Blanche* in Liverpool Bay. In consequence of the collision the *Blanche*, which was bound from Fleetwood to Liverpool, sank, and, together with her cargo of gravel, was lost, and seven of her crew lost their lives. On July 24, 1905, the *Hopper No.* 66 was pronounced alone to blame. Claims appear to have been put in, and the plaintiffs, Sir John Jackson, Limited, on November 17 of that year, instituted in the Admiralty Court a limitation suit, in which they averred that the collision was caused by the negligent navigation of the hopper by their servants, but without the actual fault or privity of the plaintiffs, and they claimed to limit their liability as the owners of the steam *Hopper No.* 66. They really were charterers by demise—the charterparty is set out, and the learned judge in his judgment gives the substantial paragraphs of it—by which the complete control over this steam hopper was given to the plaintiffs, but the legal ownership remained with the London and Tilbury Lighterage Contracting and Dredging Company, Limited, the registered owners of the hopper. In their defence to the limitation suit the point which gave rise to this appeal was raised by the defendants' pleading that the plaintiffs were not at any time material the owners of the *Hopper No.* 66. The point was thus clearly raised whether the limitation sections of the Merchant Shipping Act applied to a vessel which is chartered by demise to the persons who are working her. I suppose that since the Act of last year such a point could hardly arise. What Bargrave Deane J. said in the matter, after referring to the

(1) (1815) 4 M. & S. 288. (2) (1876) 1 Q. B. D. 428.
(3) (1881) 7 Q. B. D. 160.

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cases which had been cited to him, was this: "I now turn to the very simple defence put forward, which is as follows: This is a claim for compensation for a tort, and the full compensation is due to the claimants, unless there is any statutory provision which may reduce it. It is said that the Merchant Shipping Act, 1894, ss. 503 and 504, do. That Act must be construed strictly. The limitation of the liability to make full compensation is expressly reserved to 'owners,' and you cannot read into the sections words limiting or varying or adding to the word 'owners.' The owners of the steam *Hopper No.* 66 are, and were, the London and Tilbury Lighterage Contracting and Dredging Company, Limited. Sir John Jackson, Limited, were the charterers, and the sections do not include charterers within the term 'owners.'"

I agree in substance with what the learned judge has said, and I should like to expand a little more the reasons which induce me to arrive at the same conclusion. Looking at the history of this legislation, I think it is fairly obvious that from first to last what has been dealt with is the real ownership of vessels; and when the Merchant Shipping Act, 1894, is looked at, the idea running through it is that it is dealing with ships and their real owners. The 1st and 2nd sections, which deal with the qualification for owning British ships and the obligation to register them, have some bearing upon this point, because they fortify the view that the section which we have to consider, s. 503, dealing with the owners of a ship, British or foreign, refers to the real owner of the vessel. On the other hand, in s. 289 I find there is express mention of something to be done at the expense of the owner or charterer of the ship. In sub-s. 3 of the same section there is again a dealing with the cost of surveys and expenses of the owner or charterer of the ship. In sub-s. 4 there is this provision: "If any requirement of this section is not complied with in the case of any emigrant ship, the owner, charterer, or master of the ship or any of them," &c. Again, s. 293 has a similar provision imposing a penalty of 50*l.* for breach of the section upon "the owner, charterer, or master of the ship." Again, s. 300 begins, "The owner or charterer of every emigrant ship." So that we

find certain sections which specifically refer to the charterers by name, shewing that where the word "owners" could not necessarily include the charterers, the word "charterer" is used. It is an Act dealing primarily with owners, but in one or two sections introducing the word "charterer," and in one or two instances, by the necessity of the case, forcing upon the word "owner" in a particular section a construction which would include a charterer or an equitable owner: see *Hughes* v. *Sutherland* (1); *Meiklereid* v. *West*. (2)

The question, therefore, we have to consider is whether in the particular sections with which we have to deal there is anything which forces upon us the construction contended for by the appellants, because, unless there is, it seems to me we ought to give the term "owner" its natural meaning. These limitation sections are a limitation upon the right of persons to maintain their action, and ought to be construed strictly, and if we turn to the sections I find that there is a clear indication in the actual wording of the section in question to support the view of the learned judge in the Court below. In the first place, s. 502 commences with "The owner of a British sea-going ship or any share therein." Sect. 503 does not begin in quite the same way, but sub-s. 3 contains the words "The owner of every sea-going ship or share therein." In s. 505 the words "part owners" are used, and in s. 508 the words "part owner" are to be found. I think, having regard to the language of those sections and the necessity of construing them strictly, there can be no reasonable ground for contending that as they stand and as they are drawn they include the word "charterer." Counsel for the respondents have referred to one or two Acts of Parliament to shew that where there has been some further extension of the doctrine of limitation of liability there have been words introduced for the purpose. For instance, the Merchant Shipping Act, 1898 (61 & 62 Vict. c. 14), provided for its extension to contractors and other persons who might be interested in getting a ship from the place where she was launched to the place where she is to be registered. The words used are more extensive than the word "owners." Again, in the Merchant

(1) 7 Q. B. D. 160. (2) 1 Q. B. D. 428.

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Shipping Act, 1900 (63 & 64 Vict. c. 32), there is an extension of the limitation to owners of a dock or canal. Though this is not such a strong instance as the previous Act, there are words used extending the limitation beyond the owners and including in the term "owners" "any person or authority having the control and management of any dock or canal." It goes to shew that where there has been a desire to extend the limitation beyond persons who are owners it has been done by separate statute. The last Act, that of 1906 (6 Edw. 7, c. 48), by s. 71 extends the limitation of liability to charterers by demise. In my opinion the true meaning of the "limitation" sections of the Act of 1894 is that they are confined to persons who are the real owners of the ship, and not charterers, and I think the judgment of the Court below was right, and this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons, and therefore I have very few words to add. I am compelled to realize that throughout this long Act the word "owner" has not been used in strictly the same sense, but I should be very sorry to accept the contention that in Part VIII., which relates to a small and very definite question, there is any variation in the meaning of the word "owners." In some of these sections, as the President has shewn, it is quite clear that the word "owner" means the true owner. It is contended that in this section it includes lessee. I can see no justification for holding that it does here include lessee. I may point out that, under sub-s. 3 of s. 503, each separate accident must be accounted a separate liability to the owner, so that if the owners choose to avail themselves of this limitation of liability they must do so by separate action. Now this is made to apply to "the owner of every sea-going ship or share therein." It is evident that, so far as the class of persons to whom this section is to apply is concerned, it must be intended to apply to every person who comes under the benefit of the 1st sub-section, which gives the limitation; in other words, that "the owners of a ship, British or foreign," referred to in sub-s. 1, cannot be wider than the class defined as "the owner of a sea-going ship or share therein." That

shews that the framers of the Act were thinking of the real owners, and not of the lessees.

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KENNEDY L.J. concurred.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Hill, Dickinson, Dickinson, Hill & Roberts, Liverpool.*

Solicitors for respondents (defendants): *Batesons, Warr & Wimshurst, Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

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THE KAISER WILHELM DER GROSSE.

Admiralty—Collision—Crossing Rule—Crossing Ahead—Narrow Channel—Good Seamanship—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 22, 25, 27.

By art. 25 of the Regulations for Preventing Collisions at Sea, 1897, "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel," and, as a matter of seamanship, the waterway between two opposite points, such as the ends of the breakwaters forming the western entrance to the harbour of Cherbourg, together with so much of the adjacent water as is necessary for the navigation of the passage, should be treated as a narrow channel within the meaning of this article.

APPEAL by defendants, the North German Lloyd Steamship Company, owners of the *Kaiser Wilhelm der Grosse*, in an action of damage by collision, against a judgment of Sir Gorell Barnes, President, in favour of the plaintiffs, the Royal Mail Steam Packet Company, owners of the *Orinoco*.

The case is reported in the Court below (1), and here, on the question of the application of art. 25 of the Regulations for Preventing Collisions at Sea, 1897 (2), to a narrow passage defined by two points, such as the ends of breakwaters.

(1) Ante, p. 36.

(2) Art. 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

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The facts are set out in the judgment of the President, but, in the absence of a chart, the following outline may assist in appreciating the situation. The collision occurred at night just outside the western entrance to the harbour of Cherbourg. The weather at the time was overcast with a south-westerly breeze, and the tide the last of the ebb, nearly slack water. The western entrance is about half a mile in width, and lies between the ends of two breakwaters approximately east and west, that to the west, the Fort Chavagnac, being unlighted. In respect of the navigation, the practice, according to the evidence of the plaintiffs, is for a steamship approaching from the north to make for the light on the western end of the opposite breakwater, the Fort de l'Ouest, and, by porting, edge off to starboard as she gets near enough for those in charge to distinguish the unlighted end of the western breakwater, and then keep well to the starboard side whilst passing through the narrow passage formed by the ends of the two breakwaters. According to the same evidence a steam vessel coming out should, if necessary, by porting keep to her starboard side of the narrow passage, passing the incoming vessel port to port, and the main charges made by the plaintiffs against the defendants were that the defendant vessel when coming out committed a breach of the crossing rule (art. 19) by failing, when she had the plaintiff vessel on her starboard side, to keep out of the way, a breach of art. 22 by crossing ahead, and a breach of art. 25 by failing to keep to that side of the west passage which lay on her starboard side. On the other hand, the main charges made against the plaintiffs by the defendants were that, in breach of art. 21, the plaintiff vessel ported instead of keeping her course, in breach of art. 27, those in charge disregarded the dangers of navigation and collision, by failing to wait outside until the defendant vessel was clear of the harbour, and, in breach of art. 29, neglected, in the special circumstances of the case, the proper precaution of stopping and reversing in due time.

The action was tried on December 17 and 18, 1906, when, as appears from the report in the Court below (1), the President (Sir Gorell Barnes) found the *Kaiser Wilhelm der Grosse* alone

(1) Ante, p. 36, at p. 40.

to blame for attempting to cross ahead of the *Orinoco*, instead of following (as the *Orinoco* did) the alleged practice of passing port to port; for good seamanship dictated that the proper mode of navigating the passage was for each vessel to keep to the starboard hand in accordance with art. 25 of the Regulations for Preventing Collisions at Sea.

Sir Robert Finlay, K.C., and *D. Stephens*, for the appellants (defendants), the owners of the *Kaiser Wilhelm der Grosse*. The plaintiffs' vessel was alone to blame, for it is now admitted that those in charge of the defendants' vessel never gave a single blast signal, but twice sounded two short blasts, indicating that they intended to pass ahead of the *Orinoco*, a manœuvre which there was ample room to carry out if the *Orinoco* had not by hard-a-porting defeated their object; in other words, if the *Orinoco* had kept her course there would have been no collision. So if the *Orinoco*, as the incoming vessel, had waited only a few minutes for the outgoing vessel to pass clear, there would have been no collision. In *Taylor* v. *Burger* (1) Lord Halsbury said: "By the conduct of the parties at the time it is quite clear that (the respondents' vessel) recognized the fact that, by the universal rule that an outgoing vessel should get clear of a dock or harbour before the incomer enters, she was to wait until (the appellants' vessel) came out."

Again, the learned judge in the Court below has applied art. 25 to the space defined by the opposite ends of the two breakwaters; but in order to constitute a "narrow channel" there must be some length in proportion to the width, so that the suggested practice of the port can have no existence in fact, and to require a very large vessel like the *Kaiser Wilhelm der Grosse* to twice cross the bows of the *Orinoco* in order to pass port to port would necessitate the attempted execution of an impracticable manœuvre fraught with great danger to both vessels. The application of art. 25 is, by the terms of the rule itself, expressly limited to cases where "it is safe and practicable," so that even if the rule were applicable it would be excluded by the circumstances of this case. If the appellants' vessel is to be deemed in fault for crossing

(1) (1898) 8 Asp. M. L. C. 364, at p. 365.

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ahead, then the *Orinoco* is also to blame for persisting in porting after she saw what the other vessel was doing, and also for not stopping and reversing sooner.

[The cases of *The Knaresbro* (1), *The Clydach* (2), and *The Harvest* (3) were referred to.]

THE COURT intimated to counsel for the respondents that they need only deal with the question of not stopping and reversing in time.

Aspinall, K.C., and *C. Robertson Dunlop*, for the respondents (plaintiffs), owners of the *Orinoco*. In respect of stopping and reversing, the finding of the learned judge in the Court below is that, as soon as those in charge of the *Orinoco* realized that the *Kaiser Wilhelm der Grosse* was not going to follow the established practice and come out port to port, but was determined to cross the bows of the *Orinoco*, they reversed their engines full speed. Art. 18 of the old Rules of 1884 dealing with this matter has now been replaced by art. 23 of the Rules of 1897, and the necessity referred to in the rule cannot be put higher than that it exists if the circumstances are such as to convey to the mind of a skilled seaman that risk of collision is so imminent as to make it indispensable to stop and reverse. The evidence is that only from thirty to forty seconds were occupied in appreciating the situation before giving the order to reverse.

[The cases of *The Lancashire* (4), *The Beryl* (5), *The Khedive* (6), and *H.M.S. Sans Pareil* (7) were referred to.]

Sir R. Finlay, K.C., in reply.

May 15. LORD ALVERSTONE C.J. This is a case of collision which occurred at the entrance to Cherbourg Harbour, between one of the largest passenger ships in the world—the *Kaiser Wilhelm der Grosse*, belonging to the North German Lloyd

(1) [1907] P. 38, n.
(2) (1884) 5 Asp. M. L. C. 336.
(3) (1886) 11 P. D. 90.
(4) [1894] A. C. 1.
(5) (1884) 9 P. D. 137.
(6) (1880) 5 App. Cas. 876.
(7) [1900] P. 267.

Steamship Company, and the *Orinoco*, belonging to the Royal Mail Steam Packet Company.

I have come to the conclusion that the judgment of the learned President was right with regard to the obligations and duties of both vessels, and I should content myself with saying that I agree with his reasons, but that having regard to the able arguments which have been addressed to us by counsel for the appellants, I think it right, out of respect to them, if for no other reason, to state briefly the grounds upon which I have come to the conclusion that the judgment ought to be affirmed.

The first and most important point to be considered is which of the Regulations for Preventing Collisions at Sea applies. If we had come to the conclusion that the case fell under the crossing rule, though I have very little doubt, even then, that the *Kaiser Wilhelm der Grosse* would have been to blame for not obeying rr. 19 and 22, a more difficult question would have arisen with regard to the manœuvres of the *Orinoco*. I do not wish to express any opinion as to whether under those rules the *Orinoco* would have been to blame, but the case would have been more difficult, having regard to the duty of the *Orinoco* to keep her course and speed.

Now, the other rule which must be considered is art. 25, which is in these terms: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." I have come to the conclusion, which accords with that of the President and of the Elder Brethren below, that that rule applies, and we are advised by our assessors, so far as it is a question of navigation, and so far as it is a question for them, that the western entrance to the harbour of Cherbourg is a narrow channel within the meaning of that rule. Counsel for the appellants have strenuously argued that art. 25 did not apply, on the ground that this was what they called an entrance or opening, and not a narrow channel. I cannot think that such a construction ought to be put upon the word "channel." It is said that "channel" imports or denotes length of channel as well as breadth, narrow or wide. That may be true, but it seems to me that it is going very much further to say that if the channel is very short the article does

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not apply. To put an instance, we know in approaching an opening between buoys or between lightships there may be dredged channels, but it seems to me to be very dangerous to suggest that the obligation to keep upon the starboard side for the purpose of navigation should depend upon there being, or not being, a dredged channel of considerable length; and I think it could be seen, even from a landsman's point of view, that a place like the neck of a bottle may be a place involving exactly the same risk to vessels coming in and going out as a longer neck or channel. Therefore, looking at the object of the rules, as I suggested to counsel for the appellants, in the course of the argument, it is very difficult to see that there is not as much reason for applying art. 25 to this entrance as to longer channels. I, therefore, approach the consideration of this case from the point of view that art. 25 applies.

Under those circumstances, what were the obligations incumbent upon those in charge of the two vessels? The duty of the *Orinoco* was undoubtedly to get well over, as far as she could safely get, to the western side of the entrance, so as to enter fairly close to the side of the channel on which is Fort Chavagnac; and the duty of the *Kaiser Wilhelm der Grosse* would be to go out on the side of the channel which is near Fort de l'Ouest; and the question as to the manœuvres which either vessel would have to take in order the one to come in on the west side, and the other to go out on the east side, depends upon the points from which they approach the entrance.

Now, I think we ought to assume, on the evidence, that both vessels, speaking generally, knew perfectly well what the other was doing. They had seen one another some hours before. It was known on the *Orinoco* that the *Kaiser Wilhelm der Grosse* would come out as soon as she had taken her passengers on board, and it was known on the *Kaiser Wilhelm der Grosse* that the *Orinoco* was bound in. Therefore they were vessels which ought to be regarded as manœuvring for one another, with the knowledge that the one was coming in with the obligation to keep to the westward of the channel, and that the other was going out with the obligation to keep to the eastward of the channel; and I would point out that art. 25 is not merely a rule

which is to be obeyed by one vessel as regards another vessel, but it is a positive direction that a steam vessel shall be kept as far as practicable on the starboard side of the channel. Under those circumstances, what did the *Kaiser Wilhelm der Grosse* do? I ought to notice that it was attempted to be suggested that it was the duty of the *Orinoco* to wait until the *Kaiser Wilhelm der Grosse* came out, and in support of that contention a passage has been read from the judgment of Lord Halsbury in the case of *Taylor* v. *Burger* (1), but in my judgment that case has no application. It was the case of a dock entrance, and there was only room for one vessel to pass in or out at a time. In a channel which is half a mile wide there is no obligation on vessels to wait for one another.

I do not wish to say more than is necessary with regard to the navigation of the *Kaiser Wilhelm der Grosse*, but having regard to her duty, as laid down by the learned President, which I venture respectfully to affirm, and having regard to the admission, by those in charge of her, that their practice was to go out on a much more northerly course, in other words to take a course which would take her much nearer to the Fort de l'Ouest, that is, more to her starboard side of the channel, I must say that to go out at what is called half-speed—really eighteen knots—on a N.W. course, is only a manœuvre which can be undertaken when there is absolutely no risk of other vessels coming in. If a N.W. course is laid down on the chart it will be seen that as long as a vessel is on that course between the two piers she is preventing any other vessel from coming in. That may be a perfectly safe thing to do while no vessel is in the way, but, in my opinion, it is not a prudent course to take when another vessel is coming in or there is risk of other vessels coming in. Under those circumstances it seems to me that the *Kaiser Wilhelm der Grosse* cannot be held free from blame when, instead of keeping on the starboard hand of the channel, she kept a N.W. course to such an extent that at the admitted place of collision she was very nearly over to the west side of the channel, and at a distance from the western breakwater of between 300 and 400 yards. I need not say anything more

(1) 8 Asp. M. L. C. at p. 365.

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about this part of the case, and I do not wish to enlarge upon a navigation which seems to me to have been unfortunate and only to have been justified on the suggestion that her great speed would enable her to get across the bows of the incoming ship. I think, therefore, that the *Kaiser Wilhelm der Grosse* is to blame for this collision.

The point upon which we desired to hear counsel for the *Orinoco* was whether she stopped or reversed early enough. It must be remembered that if art. 25 applies—and I have already said that in my opinion it does—then there is no article which gives any direction with regard to the course or speed of the *Orinoco;* but with reference to the point attempted to be made by counsel for the appellants that the collision was brought about by the porting of the helm of the *Orinoco*, the moment the conclusion is arrived at that art. 25 applies, this complaint against the *Orinoco* practically disappears. It was the duty of the *Orinoco* to get over to the west side of the channel. She had slightly starboarded as she came in, at a distance of a mile and a half, or thereabouts, so as to get Fort Chavagnac slightly on the starboard bow, and when the other vessel is seen coming out she puts her helm to port and alters somewhere about two points, part of those two points being possibly due to the subsequent reverse action of her engines. All that would assist the *Kaiser Wilhelm der Grosse* if the latter had been doing her duty. It would tend to give her more room—she had ample room to port—and it cannot be said to have contributed to the collision. But it is urged that at a period when she could have stopped and reversed, and ought to have stopped and reversed, the *Orinoco* had a signal from the *Kaiser Wilhelm der Grosse*—a two-blast signal—indicating that she was starboarding her helm. I do not attach very much importance to the fact that the *Kaiser Wilhelm der Grosse* was not starboarding her helm. She could not starboard very much, because at that speed she ran very great risk of running ashore; and I take it in favour of the *Kaiser Wilhelm der Grosse*, although I think it is making a concession, that it was a signal indicating that "I want to go out ahead of you." I have already said that, in my judgment, to go out ahead of a vessel coming in was a direct infraction of art. 25, and that it was bad

seamanship and bad navigation to do it at that high rate of speed —to do it at all, or certainly at that high rate of speed; but I agree that, there being no rule which directly affects the course or speed of the *Orinoco*, it must depend upon the provisions of art. 29, which says that "nothing in these rules shall exonerate any vessel . . . . from the consequences of any neglect . . . . of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." In other words, the *Orinoco* would be responsible if she contributed to the collision by negligent navigation; but it must be borne in mind that it is not a breach of the rules involving consequences under the statute, for it is a question of negligent navigation. I think the highest that can be put against the *Orinoco* is that as soon as those in charge of her really became aware that the *Kaiser Wilhelm der Grosse* was keeping her speed and going across her bows they ought to have stopped and reversed. For the purpose of my judgment I accept that position. Now it is said—and it puts the *Kaiser Wilhelm der Grosse* in a very great dilemma—that those in charge of her gave the first signal of two short blasts when about opposite and somewhere in the neighbourhood of Fort de l'Ouest. If that is so it was, roughly, half a mile from the collision. Now, having regard to the distance of the vessels one from another, having regard to the fact that at that point the *Kaiser Wilhelm der Grosse* had ample room to port, I think that those in charge of a vessel may well pause before they act upon a signal given at that distance indicating that another vessel is going to execute a wrong manœuvre. The learned President has taken the view, which I adopt—though we were much pressed by counsel for the appellants to take the opposite view—that the sound signals were not given so far off as that, but much nearer. If they were given at that distance, and so much earlier, it would by no means benefit the *Kaiser Wilhelm der Grosse;* for I think the evidence of the pilot of the *Orinoco* shews that that man was applying his mind to the right question. He is asked: "Did you not know from her two-blast signal that she was trying to do it? Yes, but as we replied to her with one blast and she had not reached the middle of the entrance, she had time to come round, and we expected that she would have

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come round to starboard.—I think he said he hoped? We expected that she would come round to starboard.—Then she blew another two-blast signal? Yes.—And you kept on going to starboard under a port helm between the first and second two-blasts? Yes, we were keeping to the right, we could not come to port.—Why did not you stop at the first two-blasts? Because she had not yet reached the entrance, and as we gave one blast we thought she had plenty of time then to come round to starboard. All that time she had the whole of the entrance to herself, nearly two-thirds." I think he might have said nearly three-quarters.

Now, we are advised by our assessors that from a seaman's point of view there was no negligence in not stopping and reversing earlier, and I think I might put it higher and say that there was no duty upon those in charge of the *Orinoco*, as seamen, to stop and reverse earlier. We have to consider whether we can reverse the finding of the learned President, who has said in his judgment that in his opinion "it was not until it was made reasonably clear to them that the *Kaiser Wilhelm der Grosse* was determined to cross the bows of the *Orinoco* that it was necessary for them to think that she would do otherwise than come out port to port; and as soon as they could reasonably be expected to realize it I think their engines were reversed and put full speed astern." The only criticism I would address to that passage is on the word "determined." I hope that nothing I say may be thought to minimize the duty and obligation of those in charge of vessels to stop and reverse as soon as they see that there is appreciable risk of collision, because I believe more collisions have been prevented by stopping and reversing than by any other means; but I may point out that perhaps the word "determined" is a little too high. I think in this case the *Orinoco* did stop and reverse as soon as she had reasonable ground for thinking that there was persistence by the *Kaiser Wilhelm der Grosse* in wrong-doing, and, therefore, risk of collision. We are pressed to say that it would have been dangerous in the circumstances for the *Kaiser Wilhelm der Grosse* to have ported and gone round. Upon what theory of navigation it can be suggested that there was the slightest

danger in the *Kaiser Wilhelm der Grosse* porting round it is impossible to see, and therefore I think that in this case the master and pilot of the *Orinoco* were justified in waiting at any rate for some few seconds—half a minute or thereabouts—in order to see whether this signal really did mean that those in charge of the *Kaiser Wilhelm der Grosse* had elected to go out at eighteen knots, and intended taking such an extraordinary manœuvre; and the pilot was right in coming to the conclusion that for an appreciable time after passing the Fort de l'Ouest she might have been expected to port a little and go out clear of the west end of the breakwater. I think, therefore, the view taken by the learned President, that there was no negligent navigation on the part of the *Orinoco*, was right, and that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. With regard to the question of the *Kaiser Wilhelm der Grosse* being to blame, I find little difficulty. In fact I think that counsel for the appellants realized that the sole chance of saving their vessel from blame was to induce the Court to accept as a rule that in a harbour of this nature an incoming ship ought to wait until an outgoing ship has cleared. I can find no justification for holding that any such rule exists. It would be unreasonable to say that a channel half a mile broad is not wide enough for one vessel to come round the end of the breakwater, and go out and another vessel to go in at the same time so long as they keep on their proper sides, and in addition there is no evidence that any such rule exists with regard to this port. In the case referred to, in the House of Lords, the channel was a dock opening of a completely different character, and it was obvious that one ship must wait until the other had gone clear; and if that is so, it is the business of the incoming ship to wait; but that does not indicate that any such rule applies to the entrance to the harbour at Cherbourg.

Putting that argument on one side, the impropriety of the movements of the *Kaiser Wilhelm der Grosse* is evident. I agree with the opinion of the Lord Chief Justice that art. 25 applies here—that a constricted channel of this type ought to be considered to be a narrow channel within the meaning of that rule;

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and that it is the imperative duty of ships to get to the right hand in passing through such a channel. But even if I did not think that it was within that regulation, I have no doubt, and our nautical assessors advise us, that as a matter of seamanship a master ought to recognize that the proper way of using such an opening is to keep to one side, and that side is the starboard side. The consequence is that the *Kaiser Wilhelm der Grosse* was wrong in not porting round the lighthouse at the western end of the eastern breakwater and taking a northerly course in coming out of the harbour. It is only necessary to state what was the actual manœuvre of the *Kaiser Wilhelm der Grosse* to shew how rash was the conduct of her master. A vessel is coming out of the harbour of Cherbourg at night, with the knowledge that a fairly swift vessel is close to the port coming in, and she attempts to dash across the opening of the harbour at a speed which gradually rises from something like eighteen knots towards twenty-two knots, obviously trusting to her great speed to get clear, thereby performing a manœuvre which no master could help seeing involved the gravest risk of collision. I have therefore no doubt that the *Kaiser Wilhelm der Grosse* was to blame.

Now I come to the difficult part of the case, and that is whether the *Orinoco* was also to blame. The difficulty appears to me to be rather a difficulty for the Court of first instance than for us. I was much impressed by the remarks made by counsel for the appellants on the absence of material witnesses, namely, the men on the look-out on the *Orinoco*, whose absence was not accounted for. They were still in the service of the plaintiff company, and there was no reason that I can see why they were not called. In a case like this, where the preliminary acts shewed that there probably would be a serious conflict of evidence, the absence of those witnesses constitutes a great difficulty in the case of the plaintiffs. On the other hand, some of the evidence called for the *Orinoco* appears very clear and satisfactory. On the other side, the tale told by the witnesses for the *Kaiser Wilhelm der Grosse* is, to my mind, far from satisfactory. According to the master, on coming out of the port he ported (as he naturally must have done), and gave no signal, and he twice of his own

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proper motion gave a signal that he was starboarding, when on his own admission he was not doing anything of the kind. The absence of the first signal is easily accounted for, but that he should of his own proper motion twice signal that he was starboarding, when he was not doing so on either occasion, seems to me not only to have been highly improper, but also to be inexplicable if the facts were as he would have the Court believe. It looks to me as though he had received a notification that the *Orinoco* was keeping to the starboard side of the channel, and that his first signal was either an order or an invitation to her to abandon her project, and that what he did was to give a signal which somewhat exaggerated his deliberate neglect of the rule, in order that he might throw upon the *Orinoco* the responsibility of stopping at once. I cannot believe that without something having provoked him to do so he would have given a false signal; and I think the fact that he twice, on his own admission, gave these false signals throws very great doubt on the tale that was told in Court on behalf of his ship. There is, however, great unanimity in the evidence given on behalf of the *Kaiser Wilhelm der Grosse* as to what occurred, so that on the whole it becomes a case in which the question of fact cannot be adequately reviewed by a Court of Appeal. So much depends upon the way in which the witnesses gave their evidence, and their demeanour, and the impression made by them upon the Court of first instance, that I think we should not be justified if, in such a conflict of evidence, we were not to accept the finding of fact of the Court below. For that reason I accept that finding, which I think is quite consistent with the balance of evidence, namely, that the order of the occurrences was this:— that the *Orinoco* ported to get to the starboard side of the channel and gave a single blast; that thereupon the *Kaiser Wilhelm der Grosse* gave a double blast, which indicated that she was starboarding; that immediately the *Orinoco* repeated her signal that she was acting under a port helm, and was continuing so to do; that then, after a short interval, the *Kaiser Wilhelm der Grosse* repeated her signal that she was starboarding; and that thereupon the *Orinoco* stopped and reversed, and then the collision occurred at the spot which is agreed. I have, therefore, to

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consider whether in behaving in that way the *Orinoco* was guilty of improper navigation. In the first instance, I am satisfied that it was not only permissible, but that it was the duty of the *Orinoco* to port so as to pass through the channel on the right-hand side, and she certainly was right in signalling that she had done so. The difficulties commence when, in reply to that signal, she receives a signal that the *Kaiser Wilhelm der Grosse* is starboarding—an improper thing for that ship to do. The *Orinoco* may be said at that time to have been committed to a port helm; but I prefer to put it in this way,—that she had an imperative duty to keep to the right-hand side of the channel, and that no circumstances had yet arisen which would have excused her departing from that, her positive, duty; and that, therefore, what she ought to have done was to do what she did do, viz., instantly repeat the signal stating the fact that she was continuing on a port helm. She could not be sure of what was the cause of the signal that she heard. The other ship might not have heard the first signal, or might be wilfully and wrongfully starboarding, but, whatever was the meaning of this starboard helm signal from the *Kaiser Wilhelm der Grosse*, I am satisfied that it did not alter the duty of the *Orinoco*, and that she was right in continuing under port helm and signalling at once that she was doing so. But then, ought she at the same time to have stopped and reversed? Now, there were two alternative possibilities. It was possible that her second signal might have recalled the other vessel to her duty. Not only was that possible, but it is what ought to have occurred. On the other hand, it was possible that the other vessel would persist in her disobedience to the rule. We must look at the question of stopping and reversing in the light, not of one only of these possibilities, but of both. What would have been the effect if the other vessel had been recalled to a sense of her duty by the second signal? The effect would have been that the safest way to avoid the collision would be for the *Orinoco* to proceed. If she went on under her port helm she was clearing the way for the porting of the *Kaiser Wilhelm der Grosse*, and diminishing the risk of such a manœuvre bringing about a collision. If, on the other hand, the *Kaiser Wilhelm der Grosse* persisted in her disregard of the rules,

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there is no question that stopping and reversing would diminish the risk of collision; but where a vessel has to choose between two such alternatives, I cannot say that it is negligence that she does not realize that a vessel—plainly informed of the impropriety of what she is doing—is going to persist in starboarding. Had she stopped and reversed, the *Kaiser Wilhelm der Grosse* might have said, "Your second signal made it imperative upon us to port, and yet you stopped your vessel in such a manner that a port manœuvre on our part might easily bring about a collision." I am of opinion, therefore, that the *Orinoco* was justified in not stopping and reversing on the first occasion, and if I might trust my own opinion upon a matter of this kind I should say she was bound not to stop and reverse at that moment; and as soon as the second signal came, which indicated that the *Kaiser Wilhelm der Grosse* was persisting in her course, there is no doubt that the *Orinoco* immediately stopped and reversed. For these reasons I am of opinion that the *Orinoco* was not to blame, and that the appeal must be dismissed.

KENNEDY L.J. I have come to the same conclusion, and there is very little I can usefully add to the judgments which have already been delivered and which have fully dealt with the facts.

With regard to the case of the *Kaiser Wilhelm der Grosse*, it appears to me to be clear that that vessel was to blame for the collision which occurred, and I am not going to refer to her manœuvres. The fact was that without anything to prevent that vessel being navigated in that which is proved to be the regular practice—though not the absolute rule—of navigation, that vessel, leaving that port, was navigated at very great speed across the mouth of the entrance at a time when those on board knew that there was a vessel coming in. Apart, therefore, from neglect of the regulations for avoiding collisions at sea, there was a disregard of that which, under the circumstances of the case, was the duty of those who were in charge of the navigation of the defendant ship. I agree with the Lord Chief Justice and Fletcher Moulton L.J. that there was in fact a breach of art. 25 of the Regulations—that the narrow channel rule, as it

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is called, does apply to a locality such as this entrance to the harbour of Cherbourg; and if that be so it is quite clear that the only possible excuse for disregarding the rule would be that there was something which rendered it neither safe nor practicable to follow that rule; and that in the present case there is a total absence of anything which could suggest a foundation for such an excuse.

That being the case, the question—and it is a question which, on the evidence, deserves to be carefully considered—is whether those on the *Orinoco* can also be held in part to blame for this lamentable occurrence. That again resolves itself into the single question whether the *Orinoco* ought to have delayed stopping and reversing until the moment when that stopping and reversing was ordered and executed. The other suggested blame was that the *Orinoco* did not wait outside while this vessel came out of the port, and to my mind—and I think the nautical views of our advisers agree—it is absurd to suppose that with a large entrance of this kind the incoming ship is to wait until the outgoing ship has come out and cleared, as if it were the entrance to a dock through which only one vessel could pass at a time. Such a proceeding might, indeed, be actually dangerous, for there might be bad weather in which it might not be safe to remain outside, and in this entrance there was ample room for the ordinary practice to be followed. On the question of stopping and reversing there is much more weight in the contention of the defendants. I respectfully add my own opinion to that of the Lord Chief Justice as to the importance of maintaining a strict scrutiny in any case in which it is reasonably possible that stopping and reversing on the part of one of the two vessels which came into collision might have prevented that collision. The question here is: Was there blame, either statutory or in point of seamanship, on the part of the *Orinoco*, for delaying that manœuvre till the moment she did? The learned President has come to the conclusion, upon the facts, that there was no breach of duty on the part of the *Orinoco*, and we have to consider whether he has chosen that which ought not to be treated as the preferable view of the facts.

It may be taken as a fact that those on the *Kaiser Wilhelm*

der Grosse sounded a two-blast signal, indicating that their course in substance was to keep on, crossing to the port side, and the question arises whether those on the *Orinoco*, whether they gave a second short blast or not, were right in delaying—for about forty seconds after receiving that second two-blast signal—to reverse their engines. The old duty under art. 18 no longer exists, and the duty which fell upon the *Orinoco* must rest upon art. 29. I think there is no doubt what the word "required" in that rule means, because it has been long and clearly settled by authority. It must mean that which Lord Herschell laid down in *The Ceto* (1), namely: "The necessity must not be such as to become manifest only when all the facts are ascertained; but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time."

I concur in the comment made by the Lord Chief Justice on the word "determined" in the judgment of the President with reference to crossing the bows of the *Orinoco*, and I think the question must be: Ought the *Orinoco* under art. 29 to have stopped and reversed, being a vessel in the position in which she was, and having received a signal from that other vessel, and no doubt able to see, though it was night, from the position of the other vessel's lights, that she was not being navigated for the starboard side of the entrance at the time she made that signal? I am not prepared to differ from the conclusion to which the learned President came; and as it must depend upon the circumstances which a reasonable seaman on board the *Orinoco* ought then to have taken into consideration as to whether he should then stop and reverse, I think it not an immaterial fact for the defence of the *Orinoco* in not then immediately reversing that, while no doubt it could not seriously be sufficient excuse to say, "Oh, I thought the other vessel might change her course even at that moment, and do her best to comply with what proper seamanship required," this is not the case of two vessels meeting in the open sea and one apparently going, and signalling, a wrong course. In such a case it would properly be held to be very dangerous to speculate upon those who were navigating that

(1) (1889) 14 App. Cas. 670, at p. 694.

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vessel wisely repenting in time of a wrong course. Here a pilot of the place and the master of the *Orinoco* would have a right to assume that those on the approaching ship knew the rule or practice to keep to the starboard side, and to act up to the last possible moment, relying upon the other vessel obeying even tardily what was the well-known practice of the place and pursuing the course which good seamanship obviously required. It seems to me that the decision arrived at by the learned judge was perfectly right, and that the *Orinoco* is not to blame, as, in the circumstances, there was no negligence or want of reasonable care on the part of those in charge of that vessel in respect of the short—very short—delay which occurred before stopping and reversing.

Appeal dismissed.

Solicitors for appellants (defendants), owners of the *Kaiser Wilhelm der Grosse*: *Clarkson, Greenwell & Co.*

Solicitors for respondents (plaintiffs), owners of the *Orinoco*: *Holman, Birdwood & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

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Admiralty—Bill of Lading—Through Freight—Inland Carriage—Sea Transit —Portion of Consignment Lost—Lien of Shipowner in respect of Railway Company's Charges.

Goods were carried under a through bill of lading at a through rate to include land and sea transit. Some of the goods were lost during the sea transit, and on delivery of the remainder the shipowner claimed—and was held entitled—to add to the through freight on the quantity delivered the inland charges paid by him to the railway company on the portion not delivered, for the joint effect of the through bill of lading, and of the shipowner's regular form of bill of lading incorporated therewith, was to subject the goods not only to a lien in favour of the shipowner in respect of the sea transit, but also to a lien, arising prior to shipment, in favour of the railway company for the land transit of the whole parcel, which lien, on payment by the shipowner of the proper inland charges to the railway company, was transferred to the shipowner, and could be enforced by him against the goods actually delivered.

Appeal by plaintiffs against a decision of a Divisional Court, sitting in Admiralty, in favour of the defendants on the construction of a bill of lading.

The plaintiffs, Tasker & Co., are grain and flour importers, carrying on business in the city of London, and were the indorsees for value, and the persons to whom the property passed by reason of such indorsement, of three bills of lading. Each of these bills of lading was for 500 half-sacks of flour and the terms and conditions of all three bills of lading appear from the summary of the agreed statement of facts set out in the judgment of the Lord Chief Justice.

The defendants, Allan Brothers & Co., run a line of steamers from Montreal to London, and the goods described in the bills of lading having been brought by rail from Milwaukee to Montreal, were there loaded upon the *Hibernian* for carriage to London; but 366 out of 1500 bags were damaged in the circumstances set out below, and were sold by the defendants in Canada. The plaintiffs were not consulted about this sale, and were not parties thereto, but they did not make any complaint of

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the defendants having disposed of the damaged flour. The remainder, viz., 1134 bags, was transhipped by the defendants on to another of their vessels and brought forward to London. On arrival the defendants refused to release these goods to the plaintiffs unless the plaintiffs paid a sum made up by charging an ocean freight on the 1134 bags and railway charges which the defendants had paid to the Grand Trunk Railway at Montreal in respect of the carriage to that port of the 1500 bags.

The plaintiffs contended that by the terms of the bills of lading, which were signed on behalf of the railway company, and the defendants, severally, they were only bound to pay through freight upon the actual quantity of cargo delivered to them, and nothing in respect of inland charges on that part of the goods shipped on board the steamship under the bills of lading and not delivered by reason of excepted perils. For the alleged overcharge of 14*l.* 8*s.* 3*d.* the plaintiffs brought an action in the City of London Court, and on February 28, 1906, the learned judge held that they were entitled to recover that amount, on the ground that the defendants had no right of lien upon the goods that they had carried to England for more than the actual freight payable on those goods. The defendants appealed to a Divisional Court sitting in Admiralty, and on May 16 the President (Sir Gorell Barnes) and Bargrave Deane J. reversed the decision, and entered judgment for the defendants with costs there and below, on the ground that, on the true construction of the bills of lading, the defendants on the arrival of the goods in London had a lien on them for the whole of the charges which had been paid in respect of the inland freight at Montreal, and, therefore, were not only entitled to receive the through freight on those goods which were delivered in London, but so much of the charges as had been paid in respect of inland freight for those which had not been delivered.

The plaintiffs appealed.

March 18, 1907. *F. D. Mackinnon*, for the appellants (plaintiffs).

C. Robertson Dunlop, for the respondents (defendants).

The arguments of counsel sufficiently appear from the

judgments. The following cases were referred to: *Greeves* v. *West India and Pacific Steamship Co.* (1); *Gardner* v. *Trechmann* (2); *Kitts* v. *Atlantic Transport Co.* (3)

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Cur. adv. vult.

May 7. LORD ALVERSTONE C.J. This is an appeal from a Divisional Court sitting in Admiralty in an action brought in the City of London Court by the plaintiffs, the consignees of a quantity of flour, to recover the sum of 14*l.* 8*s.* 3*d.*, being an amount paid by them under protest to Allan Brothers & Co., in excess, as they allege, of their true indebtedness to Allan Brothers & Co., as the owners of the steamship in which the goods, of which the plaintiffs were consignees, had been conveyed from Montreal to London, under the circumstances which I will shortly state.

The facts are agreed, and may be briefly summarized as they appear on the agreed statement. The Gem Milling Company, Milwaukee, consigned to the Gem Milling Company, London, 1500 bags of flour by three through bills of lading or contract notes, which provided that the flour should be carried from Milwaukee to London at an all-round rate of 19 cents per 100 lbs. This rate included railway and other carriage from Milwaukee to Montreal, and freight from Montreal to London. On the voyage of the steamship *Hibernian* from Montreal she ran aground, and of the 1500 sacks 366 were damaged, and were sold, and the balance, viz., 1134, were transhipped into another of the defendants' steamers and duly arrived in London. Upon the plaintiffs, the consignees, demanding delivery of these goods, the defendants, as a condition of delivery and in exercise of a claim of lien, required payment of a sum of 85*l.* 5*s.* which consisted of a charge of 6 cents per 100 lbs. as ocean freight on the 1134 bags delivered, and of 59*l.* 1*s.* 3*d.* for the American inland carriage, which had actually been paid by the defendants to the American railway company, on the 1500 bags of flour from Milwaukee to Montreal. To the payment of 14*l.* 8*s.* 3*d.* out of this 59*l.* 1*s.* 3*d.*, representing the amount of the American railway carriage and

(1) (1870) 3 Mar. L. C. 426. (2) (1884) 15 Q. B. D. 154.
(3) (1902) 7 Com. Cas. 227.

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charges upon the 366 bags which were not delivered in London, the plaintiffs objected, but ultimately paid, and they now claim in this action to recover that amount from Messrs. Allan Brothers & Co.

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The Divisional Court has decided that, having regard to the terms of the contract upon which the bags were carried, the plaintiffs are not entitled to succeed. The question depends entirely upon the terms of the contract. Each of the three through bills of lading or contract notes provided that the bags to which it related should be carried from Milwaukee to London at 19 cents for 100 lbs. gross weight. The contracts contained two sets of conditions, one relating to the land service until delivery at the port of Montreal, the second relating to the service after delivery at Montreal until delivery in London. Under the first set, condition 12 was in the following terms: "This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agents, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company." This condition, in my judgment, has only an indirect bearing upon the question we have to decide. What it provides is, that the railway company shall have a lien upon the goods for the inland freight charges payable by the steamship company on taking delivery at Montreal. The conditions relating to the ocean carriage which are material are as follows:—

(5.) "That the carrier shall have a lien on the goods for all freights, primages, and charges, and also for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect, or insufficient marking, numbering, or addressing of packages or description of their contents."

(15.) "That freight payable on weight is to be paid on gross weight landed from ocean steamship, unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight."

(17.) "That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment,

and to all local rules and regulations at port of destination not expressly provided for by the clauses herein."

In my view, condition 5 gives the ordinary lien for freights, primages, and charges in respect of the ocean transit. Condition 15 deals with the way in which the freight shall be calculated upon the goods landed. Condition 17, read in connection with the Allan Line bill of lading, to which it refers, is the condition on which, in the opinion of the Court below and in my own, the question turns. The words "all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment" were, for the purpose of argument, agreed to mean the bills of lading of the Allan Line. Those bills of lading contained the following clause: "When the goods are carried at a through rate of freight the inland proportion thereof, together with the other charges of every kind (if any), are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof." It is, in my opinion, clear, and indeed it was not disputed by Mr. Mackinnon, who argued the case on behalf of the appellants with great ability, that under this clause, taken by itself, if the shipowner paid the inland proportion, that is to say, the land charges upon the consignment, the shipowner would have a lien on the goods until repayment, or, in other words, that the clause in the Allan Line bill of lading just quoted was the counterpart of clause 12 of the first set of conditions on the through bills of lading, and was intended to protect the shipowner in respect of payments made by him to the railway company; but it was contended on behalf of the plaintiffs that this clause, properly interpreted, was inconsistent with the provision of the through bills of lading that the goods should be delivered on payment of 19 cents per 100 lbs.

In my judgment, the view taken by the Divisional Court is correct. There is, under the contract contained in the through bill of lading, an obligation to deliver the goods on payment of an agreed freight of 19 cents per 100 lbs.; but the bill of lading shews on its face that the contracting parties knew perfectly well that, the route being a through route at a through rate,

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some part of the through rate would be payable to the inland railway company carrying the goods from Milwaukee to the port of shipment, and accordingly, as it provided that in respect of these charges the inland freight was to be a first lien, it is provided by virtue of clause 17 that, in addition to the liability to pay the freight upon the quantity actually delivered, there shall also be a lien for moneys paid by the steamship company to the inland carriers in order to release the goods from the lien which the inland carriers had upon them; or, in other words, there are two liens created by the through bill of lading, one by clause 5 in respect of the ocean freight, the other by clause 17, incorporating as it does the conditions of the Allan Line bill of lading in respect of payments properly made by the shipping company to the railway company. Of course, in respect of the goods delivered in London, these two liens may be said to coalesce or overlap, but this does not, in my opinion, prevent the clause taking effect where, as in this case, the shipping company have paid to the railway company inland charges upon that part of the goods which has not arrived. To state the matter shortly, it being conceded that if the goods were carried under the Allan Line bill of lading the shipping company would have the lien in question, their right to enforce that lien is not destroyed by the fact that some portion of the goods was lost in transit.

FLETCHER MOULTON L.J. This is a most unsatisfactory case, and it has given me very grave doubt during the long consideration that I have given to it. The difficulty in the case is due solely to the slovenly way in which the document constituting the contract of carriage is drawn up. I regret to say that in this respect it resembles many other mercantile documents which by their nature have grown up by a long process of adding new terms and conditions to documents of older date, without any regard to whether they fit in with the provisions of those prior documents. Such documents become well-nigh unintelligible as contractual documents, and so far as my experience goes I have never met with so gross a case as the present one. Again and again I have found myself on the point of coming to the conclusion that it is the duty of the Court to refuse to interpret this document.

It purports to be a through bill of lading, carrying goods from Milwaukee to London, partly by land carriage and partly by sea carriage, on ships of the Allan Line. It was admitted during the argument, and I think it is clear from the nature of the contract, that the land carriers and the sea carriers here combined to make an offer to the public to carry goods for the whole of the transit at a through rate. No doubt the through freight was to be divided between the land carriers and the sea carriers, and in fact there are unmistakable indications in the conditions and terms of the contract that that was to be done; but the proportions in which the total freight was to be divided between the two are nowhere expressed in the contract, and, it was admitted at the Bar, were probably wholly unknown to the persons availing themselves of the through freight. The only reference to this division of freight between the two parties to the carriage—the inland carriers and the Allan Line—is to be found in condition 12, in the left-hand column of conditions, that is to say, in the column which relates to the conditions of the land carriage. It there states that the inland freight, the amount of which it does not define, shall be a first lien on the goods being carried; but it immediately provides that that shall not affect the consignee, because the steamship company, that is to say, the Allan Line, are to lift the lien by paying the inland charges. Thus, so far as the consignee is concerned, it does not affect the matter at all. We therefore have, so far as the consignee is concerned, a contract for the whole of the transit at a through freight; and the obligation to deliver the goods at London on the payment of that through freight is absolute.

In the bill of lading there naturally are conditions with regard to the responsibility of the carriers for the goods carried, and we find in the right-hand column a series of such conditions mostly of a nature to exculpate and hold harmless the carriers in respect of accidents of travel, or giving them certain rights over the goods in respect of the services they render. It is under those conditions that the claim is made in the present case by the defendants, who claim that they were justified in holding the goods until the inland freight on the portion of the goods that had been lost had been paid to them by the consignee. It is

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clear they must get some warrant for so doing, because the provision as to delivery of goods against payment of the through freight is expressed in very absolute terms, and it was admitted at the Bar that this meant payment in proportion to the weight of the goods delivered, so that unless there is some condition which justified them in insisting upon a payment beyond that freight on the actual weight delivered they were wrong in refusing to deliver the goods. They suggest that more than one of the conditions in the bill of lading justified them in thus asserting a lien for the inland freight on the goods that were lost. They first appeal to No. 5, which gives a lien for all freights; but that imposes no liability to pay freight. It simply gives a lien for freights to which they have a right; and therefore it must be elsewhere that you must find the obligation to pay, although so soon as you can find an obligation to pay this enables you to enforce it by a lien. So I pass from that, and I come to the condition upon which this case really turns; that is to say, condition 17. It is in these words: "that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein."

The contention that is put forward on behalf of the respondents here is that this incorporates all the conditions of the bill of lading in use by the Allan Line at the time. There seems to be no doubt that this is the bill of lading referred to.

If we look at the through bill of lading which we have before us we find it is practically a complete bill of lading, dealing with all the matters usually dealt with in bills of lading. The Allan Line bill of lading is also a complete bill of lading, also dealing with all the matters usually dealt with in bills of lading. Therefore, taking the words of this condition, it would seem to provide that these goods are carried according to one bill of lading subject to all the conditions of another bill of lading. These two bills of lading are just as different as two independently drawn bills of lading, drawn the one without any reference to the contents of the other, would naturally be.

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This Court is asked to decide what is the meaning of a bill of lading which says that the goods are carried under it subject to all the conditions of another bill of lading. I have examined with the greatest detail the conditions of these two bills of lading, and they appear to me to be wholly distinct and on an abundance of points irreconcilable, and, as I have said, I have felt many times inclined to say that the document is as a contractual document utterly unintelligible. There is a long carefully drawn list of risks in the through bill of lading, the actual bill of lading under which the goods were carried, defining what are not to be the risks of the carriers. If you look at the corresponding list in the Allan Line bill of lading it is not only not the same, but it is expressed in wholly different language. The very conditions under which the goods are to be delivered when the freight is paid are different in the two. The special conditions with regard to grain are quite different; and it is to me extraordinary that the enormous trade which must be done by the Allan Line on through bills of lading should be governed by documents which as contractual documents are in such a hopeless muddle. But I realize that it would be a very serious thing if the Court were to take up the position that on account of the form in which it is drawn up the document is unintelligible, and so I have, perhaps against my better judgment, striven to give to it such meaning as I think would be given to it in business by persons who were not so much lawyers as men of business. Accordingly I have come to the conclusion, (especially seeing the weight of judicial opinion in favour of sustaining the contention of the respondents), that perhaps the best interpretation to put upon the document in order to do justice between the parties is this:— that it is a notification to the shipper that his goods would be carried, so far as the sea carriage is concerned, in accordance with the well-known Allan Line bill of lading. Although the form in which the document is drawn up makes it extremely difficult to give to it that meaning, and that meaning simply, I think that would be the impression produced by it among business men. Probably it is best in this case to give to it that effect, and, therefore, I am of opinion, though I say so with great doubt and difficulty, that on the whole the Allan Line bill of lading

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dominates here sufficiently to give the shipowners the lien on the goods which they claim.

Lord Alverstone C.J. I am authorized to say that Kennedy L.J. concurs in the judgment I have delivered.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *William A. Crump & Son.*

Solicitors for respondents (defendants): *Holman, Birdwood & Co.*

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Feb. 18; *March* 4.

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Admiralty—Collision—Damage—Loss of Use of Vessel—Working at a Loss to establish new Trade—Remoteness.

In the case of a vessel, worked at a loss to establish a new trade, and temporarily put out of employment whilst undergoing repairs necessitated by a collision, the contingent profit which may hereafter be earned, when the trade is established, and rates become remunerative, is too remote to be taken into consideration as special damage, and, in such a case, there being no loss, apart from actual expenses, which can be shewn to result from the deprivation of the use of the vessel, general damages are also not recoverable from the owner of the wrong-doing ship.

Motion in objection to the report of the registrar after a reference in an action of damage by collision.

The plaintiffs were the Glasgow Shipping Company, Limited, owners of the *Nile*. The defendants were the Tyzack and Branfoot Steamship Company, Limited, owners of the *Bodlewell*.

On January 1, 1906, a collision occurred between the *Nile* and the *Bodlewell*, and, their owners having admitted liability on the footing of both to blame, their respective claims were referred to the registrar assisted by merchants. The *Bodlewell*, a vessel of 3420 tons gross register, was, at the time of the casualty, on a voyage from Calcutta to Middlesbrough as one of a fleet of five steamships engaged in the East Indian trade, to which she had been transferred since September, 1905, and was running on

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unremunerative voyages, that is, with full cargoes, but at unremunerative rates, with the object of securing a footing in the trade, though, previously to the above date, she had been profitably employed. The damage to the vessel necessitated her detention at Bizerta for seventy-eight, and at Sunderland for thirty-five, days undergoing repairs. In respect of this period of 113 days, during which they were deprived of her use, the owners of the *Bodlewell* claimed to recover 2871*l.* 14*s.* (including expenses at 16*l.* 10*s.* per day) in respect of the delay at Bizerta, and 1914*l.* 9*s.* 4*d.* (including expenses at 9*l.* 10*s.* per day) in respect of the delay at Sunderland, making together 4786*l.* 3*s.* 4*d.*, but in respect of both these items the registrar allowed only 1349*l.* 10*s.* as representing out-of-pocket expenses.

Laing, K.C., and *H. C. S. Dumas*, in support of the objection by the defendants, the owners of the *Bodlewell*, to the registrar's report. Although the *Bodlewell* was not being run at a profit when she sustained the damage through the collision with the *Nile* which formed the subject of the claim for assessment in the registry, her owners are entitled to recover general damages against the plaintiffs for the deprivation of the use of their vessel whilst she was undergoing repair, and, if they had hired another vessel during the period of detention, they would have been entitled to recover the cost. The defendants must also be entitled to claim as special damage, irrespective of profit-earning, the loss of interest on a capital of 35,000*l.* unemployed for 113 days, during which time the owners of the *Bodlewell* were deprived of the means of attempting to break down the ring opposed to them, and depreciation should be taken into account, for, owing to the collision, the period was lengthened before the *Bodlewell* would become a profit-earning vessel. In *The Greta Holme* (1) the House of Lords, reversing the decision of the Court of Appeal, held that the Mersey Docks and Harbour Board were entitled to recover damages for the loss of the use of their dredger, damaged by collision, although the dock board were not out of pocket in any definite sum, and derived their funds from rates, so that they could not distribute profits.

(1) [1897] A. C. 596.

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Again, in *The Mediana* (1) the House of Lords held that the same dock board were entitled to recover, from the owners of the steamship which had run down their lightship, not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by a substituted lightship.

Aspinall, *K.C.*, and *Balloch*, contra. It is admitted by the owners of the *Bodlewell* that, at the time of the collision, the vessel was not only not making a profit, but was trading at a loss, and it is also admitted that since the collision she has not done any better. The hope that she may hereafter be run at a profit is too remote and speculative to form the subject of a specific claim against the owners of the *Nile*, for to allow such a contention, and give the owners of the *Bodlewell* more than the actual expenses whilst they were deprived of the use of the vessel, would, in effect, alter the doctrine of restitutio in integrum upon which this Court acts, and render the position of the claimant better by reason of the collision, that is to say, the owners of a vessel trading at a loss might recover more than in the case of a vessel trading at a profit. In *The Argentino* (2) Bowen L.J. says that "the only question, in case of a collision, seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage." In *The Greta Holme* (3) the dredging work was delayed. In *The Mediana* (1) another vessel was substituted for the damaged

(1) [1900] A. C. 113.
(2) (1888) 13 P. D. 191, at p. 201.
(3) [1897] A. C. 596.

lightship, and in both these cases these matters were taken into account, as the tribunal must be satisfied, before awarding damages, that a loss has been incurred.

Laing, K.C., in reply. *The Argentino* (1) was a case of special damage, and if, in the circumstances of this case, the Court should come to the conclusion that there is no ground for special damage, still, on the authority of *The Greta Holme* (2) and *The Mediana* (3), general damages must be recoverable, for, in the words of Lord Halsbury in the latter case, "where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used, or is taken away so that it cannot be used at all, that of itself is a ground for damages"; and further on the same learned judge asks: "What right has a wrongdoer to consider what use you are going to make of your vessel?"

Cur. adv. vult.

March 4. BARGRAVE DEANE J. This is a motion in objection to the registrar's report. The two vessels came into collision, liability was admitted, and the matter was referred to the registrar and merchants to go into the figures and report at what amount the damage should be assessed. The registrar's report was accepted with the exception of two items which have been lumped into one, "loss of use of the vessel *Bodlewell* at Bizerta and also at Sunderland," the places where the vessel was repaired as a result of the injury. The claim was for a total sum of 4700*l.* odd, and the registrar in his report allows 1349*l.* 10*s.*

The objection is that the registrar has only allowed out-of-pocket expenses, and has allowed nothing for the deprivation of the use of the vessel during that time. The question is an important one. The *Bodlewell*, previous to this voyage on which she sustained damage, had been employed at considerable profit on quite different voyages, but having made a considerable profit on those other voyages, she had been taken off that service, and with other vessels belonging to the plaintiffs had been placed on a

(1) 13 P. D. 191. (2) [1897] A. C. 596.
(3) [1900] A. C. 113.

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line to carry cargo to the East, returning to Middlesbrough. Her owners did not, according to the evidence, expect to make any profit at first upon that line. They saw an opening, and hoped that in course of time they would establish a prosperous line between Middlesbrough and the East, and it was whilst they were seeking to obtain that prosperity, and before obtaining it, that this accident happened. Not only did they not anticipate making a profit, but it is admitted in the evidence before the registrar that they were making a loss, and it was said that the freights they were earning did not amount to so much as the expenses of the vessel.

In all these cases of damage there are two sorts of damages which have to be considered, general damage and special damage, and in the old days this Court was in the habit of only recognizing what could be put as special damage. An example of that will be found in *The Argentino* (1), where the Court held that where a vessel on her way home was damaged, and therefore was unable, owing to the delay, to take up a charter which had been prepared for her subsequent voyage, she was entitled to be recouped the damage for not being able to take up that charter which had been accepted for her. That was special damage. There was a special loss which could be dealt with, and was dealt with by the Court.

I am not aware, however, that antecedent to *The Greta Holme* (2) that doctrine had been carried very much further in the case of ships. In ordinary cases of damages the question is referred to the jury, who find a lump sum, and it is very seldom easy to ascertain the process by which they arrive at that lump sum. We know that in the case of individuals, where a man is injured, the jury are told to assess general damages for pain and suffering, and we know that on the other side of this Court a co-respondent has to pay damages for the pain and suffering caused to the husband by the seduction of the wife. That is "general damages." You cannot put your finger on any special pecuniary loss which in that respect can be found or damages awarded for. You cannot apply that to a ship. You cannot say that a man should be awarded general damages in respect

(1) (1889) 14 App. Cas. 519. (2) [1897] A. C. 596, at pp. 602, 603.

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of his regret and sorrow and trouble for his ship being disabled. With regard to a ship it seems very difficult to see where your general damages come in.

I have to deal with this case on the principles laid down in the two cases decided in the House of Lords, *The Greta Holme* (1) and *The Mediana*. (2) In those two cases a dredger and a light-ship, the property of a public authority, were injured. They were not working for a profit, in the ordinary sense of the word, to the owners. They were employed to carry out certain public work, and the question of general damages was a very difficult one to decide. The question of a vessel of this sort, which is used for the purpose of pecuniary profit, is on quite a different basis. Therefore I have, as far as I can, to apply the principle of *The Greta Holme* (1) and *The Mediana* (2) as applicable to the circumstances of this case.

Now in *The Greta Holme* (1) there are certain matters to which I will refer to shew that I am as far as possible following the principles there laid down. In that case the plaintiffs, the owners of the vessel damaged, were the Mersey Docks and Harbour Board, which is a public body, and Lord Halsbury said this: "This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrongdoer." That is only a general principle. Then Lord Watson says this: "I am not prepared, unless in circumstances which do not occur in this case, to lay down the rule that a corporation which does not pursue its operations for the sake of gain, in the ordinary sense, does not suffer appreciable damage from their interruption," that is to say, I am not prepared to say that this public authority, by being deprived of the use of its dredger, does not suffer from having that dredger stopped in the performance of public work. Then he says that the principles which have been followed by the Courts below, but which he was not prepared to follow, seem

(1) [1897] A. C. 596, at pp. 602, 603. (2) [1900] A. C. 113.

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"to go this length" that "a corporation who invest large sums of money in a dredger, or in any other article which they intend to use, and do use continuously, for purposes which are of interest to them, and protect the pocket of the ratepayers, although they are not productive of private gain, can recover from a wrongdoer the cost of repairing injury done to these articles, but are not entitled to recover damages from the person who deprives them of the use of such articles without lawful cause." Therefore that learned judge seems to think that in the case of this steam dredger not only are the plaintiffs to be recouped the actual loss occasioned by necessary repairs, but also to recover damages for personally being deprived of the use of the article. It is very difficult quite to follow how you are to assess damages in that sort of case, unless it be by estimating what the expense would be of procuring another vessel to take the place of the dredger which had been taken off. That is *The Greta Holme*. (1) Can it apply to this case? I ought to say that the House of Lords reversed the decision of the Court of Appeal, which thought there were no damages applicable because no profit was shewn by the plaintiffs.

In *The Mediana* (2) the Court of Appeal (3) felt that they had to follow the House of Lords' decision in *The Greta Holme*. (1) A. L. Smith L.J. says he must follow the decision in *The Greta Holme* (1), and Collins L.J. says this: "I take the decision in the case of *The Greta Holme* (1) to be this, that the deprivation of a chattel by a wrongdoer is of itself a ground of damages to the owner, irrespective of the special use to which the chattel might have been applied, and for which there might also be special damages. The two may co-exist, and in the case of *The Greta Holme* (1) they did. It is said that in the present case they do not, but I am not sure about that. If, however, they do not, still the deprivation of the chattel would, in my opinion, ground a claim for damages"—that is, again, if there are damages. You cannot award damages unless you can see there are damages. The question is whether you can go beyond special damages and award others as general

(1) [1897] A. C. 596, at pp. 602, 603. (2) [1900] A. C. 113.
(3) [1899] P. 127, at pp. 134, 138.

damages for the deprivation of the chattel. Lower down the Lord Justice quotes Lord Halsbury's decision in *The Greta Holme* (1): "Lord Halsbury says it is no answer to the claim to allege that the person would not have made money out of the chattel taken away if it had been left in his possession, and he then goes on to deal with the fact that had they had it they would have performed a public service with it. In the present case a public service would have been equally performed, though in a different form. One is just as much a public benefit as the other, and in neither case is there pecuniary loss. The loss which the owners have sustained stands on exactly the same principle in either case. They are deprived of an instrument by which they were doing a public benefit." There again the difficulty I have is this, that there, as in *The Greta Holme* (1), the Court said that the fact of a public authority doing a public benefit shews that there is a loss owing to the chattel being taken away and put out of use. Then *The Mediana* (2) went to the House of Lords, and some of the judges were the same as in *The Greta Holme*. (1) Lord Halsbury refers to the decision in *The Greta Holme* (1), and says: "Lord Herschell in terms did lay down a much broader principle, and I may say that I myself intended to lay it down, though I may have expressed myself imperfectly, namely, that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages"—that is to say, again, damages beyond the mere expenses incurred through the actual physical injury, depreciation, and so on. Further on he says this: "What right has a wrongdoer to consider what use you are going to make of your vessel?" That does apply to this case. Lower down again he says: "The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except —and this, I think, has been the fallacy running through the arguments at the bar—when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognizes as special damage. In

(1) [1897] A. C. 596. (2) [1906] A. C. 113.

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that case you must shew it, and by precise evidence, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so as to give the persons responsible for making good the loss an opportunity of inquiring into it before they came into Court. But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damage at all: 'We will give the plaintiffs a trifling amount' —not nominal damages, be it observed, but a trifling amount. In other cases it would be more serious." The other Lords of Appeal agreed with that judgment.

Practically it comes to this, that, apart from special damages, you are entitled to ask the jury, as in this case you ask the Court, to award you general damages, if you can shew them. Another case has been cited, that of *The Marpessa* (1), which was decided by the President and affirmed by the Court of Appeal, but as it is under appeal in the House of Lords, I will not deal with it. Although to a certain extent the decision of the President and of the Court of Appeal in *The Marpessa* (1) is in accordance with my views, still my judgment is not based upon it, but I distinguish, as I believe I may do, those other cases from the present case.

Here is a vessel admittedly trading at a loss. Her expenses are greater than her freight is expected to be, and at a future time it is hoped she may be able to make this new line a profitable concern. That we do not know, and I am justified in saying that damages based on that would be very remote. Therefore I take out of consideration the possibility of this vessel at some future time making a profit in this new line. It may be said that it is part of the large whole, that when you start a new line you have to do this preliminary work at a loss before you can hope to make a profit. I think any such consideration is a great deal too remote to be brought into account on the question of

(1) [1906] P. 95.

the amount of damage sustained. But, although working at a loss, the plaintiffs were deprived of the use of their vessel for 113 days, during which she was under repair. It is not like *The Argentino* (1), where there were prospects of a beneficial charter. It is said to be a case of a vessel being injured while on a particular voyage where she was working at a loss. Now the registrar has allowed all the expenses, and during these 113 days the plaintiffs, instead of working at a loss, were not working at a loss. They were having all their expenses paid, and therefore, in a sense, they were benefiting by the delay. The question seems to me to be this: Is there any damage? Is it possible you can find anything like general damages in this case? I have pointed out that you cannot apply the question of suffering and sorrow to it. Supposing this vessel was making a profit instead of a loss, say 30*s.* a day. That would be a measure of general damage. But are you to take a percentage on her value? What percentage are you to take? Five per cent.? If you do you would be giving her profit which she would not otherwise have had. The vessel would be more profited by being damaged in collision than if she had continued her voyage without accident. I cannot see my way to say that there is anything on which I can give general damages. I do not think there are any damages accruing to this vessel which have not been included in the registrar's assessment. For these reasons, the motion must be dismissed, with costs.

Solicitors for appellants (defendants): *Botterell & Roche.*
Solicitors for respondents (plaintiffs): *Pritchard & Sons.*

T. L. M.

(1) 14 App. Cas. 519.

C. A.
1907
May 16.

[IN THE COURT OF APPEAL.]

THE KATE.

Admiralty—Collision—Damage—Contract of Indemnity—Third Party Notice.

A steamship was brought from the entrance of a dock to her berth by two tugs, and was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dockmaster sent a man from each of the tugs to loosen the barge's headfast, and directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propeller of the steamship and sustained such damage that she sank with her cargo.

In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters and crews of the tugs should cease to be under the dock owners' control in connection with the towage, and become subject to the orders and control of the master or person in charge of the vessel, and be the servants of the owners thereof:—

Held by the Court of Appeal (affirming the decision of the Court below, [1906] P. 317), that the steamship owners were not liable, as third parties, to indemnify the dock owners, for, whether the contract to supply the two tugs was made with the ship repairers or with the steamship owners, that contract was at an end, and, therefore, the men from the two tugs, directed by the dockmaster to loosen the headfast, had resumed their position as servants of the dock owners, and the action of the third tug, under the direction of the dockmaster, was independent of the transporting contract which applied only to the two tugs.

Appeal by defendants against a decision of Bargrave Deane J. in favour of third parties in respect of an indemnity for the defendants' liability for the damage sustained by the plaintiffs through the sinking of their barge.

The plaintiffs were Bellamy's Wharf, Limited, bailees for hire of the dumb barge *Kate* and owners of her cargo. The defendants were the London and India Docks Company, the owners of the Royal Albert Dock and owners of the steam-tugs *Rattler*,

Beatrice, and *Louise*. The third parties were the Tyser Line, Limited, owners of the steamship *Marere*.

The facts are fully set out in the report in the Court below (1), and, shortly stated, were that—

On April 5, 1906, R. & H. Green, Limited, contracted with the third parties, the Tyser Line, Limited, to transport the *Marere* from her discharging berth in the Victoria Dock to their dry dock, and back to her loading berth in the Albert Dock, the vessel during transporting, whilst in dry dock, and until moored at her berth to be at their risk. As the defendants, the London and India Docks Company, do not allow any tugs other than their own to tow any vessel in their docks, the marine superintendent of the third parties, on April 30, signed (as the Court below found), on behalf of R. & H. Green, a towage ticket addressed to the superintendent of the defendant company for the supply of tugs to assist in transporting the *Marere* from the entrance of the dock to her loading berth. The conditions on the back of the ticket were as follows:—

"Notice is hereby given that tugs $\frac{\text{and}}{\text{or}}$ transporting men are supplied on the following conditions only: The masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport, and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to person, or to the vessel or craft towed, or any cargo on board the same, or to any vessel or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss, or injury be occasioned by any actual or supposed act, neglect, or default of any of such masters, crews, or men, or any servant of the company, or by any defect or insufficiency of the tugs or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport."

In pursuance of this contract, and on the same day, the dock

(1) [1906] P. 317.

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company supplied the tugs *Beatrice* and *Louise*, and the *Marere* was brought to her loading berth in the Royal Albert Dock basin and made fast; but before both tugs had actually cast off a difficulty arose owing to some barges, attached to a buoy in the dock, being in the way, and so preventing those in charge of the *Marere* from hauling on the winches aft and, by bringing the vessel a few feet astern, getting her completely into position. The dockmaster seeing this, ordered a man from each of the two tugs to loosen the headfasts, and directed a third tug, the *Rattler*, to tow the barges away; but this operation was so negligently performed that one of the barges, the *Kate*, fell against the starboard propeller of the *Marere*, and sustained such damage that she sank with her cargo.

The plaintiffs, Bellamy's Wharf, Limited, as owners of the *Kate* and of her cargo, claimed damages against the defendants, the London and India Docks Company, for the loss, and the defendants admitted liability, but served the Tyser Line, Limited, with a third party notice alleging that they were entitled to be indemnified by the third parties on the ground that by the terms of the contract under which the defendants, the London and India Docks Company, supplied tugs for the transport of the steamship *Marere*, the Tyser Line, Limited, agreed to indemnify the London and India Docks Company against all liability in respect of their supplying to them such tugs for the transport which was being performed when the collision took place.

The third parties denied that they requested the defendants to supply tugs to assist in transporting the *Marere*, and denied that they undertook to indemnify the defendants, and alleged that the damage to the *Kate* and to her cargo was occasioned by the defendants' servants acting under the orders of their dockmaster whilst engaged in performing the defendants' obligation to the third parties to provide the steamship *Marere* with the berth which had been allotted to her, and for which they received reward from the third parties, and was in no way connected with the transporting or assisting of the vessel by the two tugs.

The issue between the defendants and the third parties was tried by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, on July 26 and 27, 1906, and on July 30

the learned judge delivered judgment, holding that the question turned on the interpretation to be placed upon the notice printed upon the back of the order given to the London and India Docks Company to supply tugs to assist in transporting the *Marere* from the locks to her berth in the Albert Dock, and that, under that document, the Tyser Line, Limited, owners of the *Marere*, were not liable, as third parties, to indemnify the defendants, the London and India Docks Company, as the contract to supply the two tugs *Beatrice* and *Louise* was made with the ship repairers, R. & H. Green, and not with the Tyser Line, Limited, but whether that were so or not, the contract for the supply of the two tugs was at an end; and, therefore, the men from the two tugs, directed by the dockmaster to loosen the barge's headfast, had resumed their position as servants of the defendants, the London and India Docks Company, and the action of the third tug, the *Rattler*, under the direction of the dockmaster, was independent of the transporting contract, which applied only to the two tugs *Beatrice* and *Louise*.

1907. May 16. *R. A. Wright* (*J. A. Hamilton, K.C.*, and *Wallace* with him), for the appellants (defendants), the London and India Docks Company.

The arguments of counsel were the same as in the Court below.

Laing, K.C., and *Dawson Miller*, for the respondents (third parties), the Tyser Line, Limited, were not called upon.

LORD ALVERSTONE C.J. In this case I think the result at which Bargrave Deane J. has arrived is right. Two points have been raised, upon one of which I am not quite so clear that I should have followed the judgment of Bargrave Deane J., but we have not heard counsel for the respondents upon that point, and, therefore, I do not wish to express any final opinion respecting it. All I will say is this, that I can quite understand the shipowners coming under some liability in respect of an obligation undertaken by them or by a person on their behalf under such a contract as this, even though there had been an arrangement that the payment of some particular service was to be made by a third

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party. I am not prepared without further consideration to assent to the view that there was no responsibility upon the shipowners by reason of Barnes, their agent, having signed or been party to a contract which contained this condition.

Lord Alverstone C.J.

It seems to me, however, that there is a very clear ground upon the second point decided by the learned judge, on which I entirely concur in his view. Taking the contract in the sense contended for by counsel for the appellants, and assuming for the moment that Tyser & Co. are to be held the principals, what are their obligations? Inasmuch as this is a contract which is to make people liable for negligence or want of skill of other persons than their own servants, it requires to be construed strictly. It says: [The learned judge read the terms of the notice on the back of the order, and continued:—] I agree that from some points of view the words are wide. I agree that for the present purpose it may be assumed in favour of counsel for the appellants that the words include negligence of masters and crews of the tugs, defect in machinery of the tugs or tackle, and possibly any act done by any servant of the company in connection with the towage or transport. That is a construction of the condition to which the appellants' counsel cannot object. I can quite appreciate that others might put a narrower construction upon it, but for the purpose of the present judgment I will assume the wider. In both parts of the clause which indicate the liability you find the words "in connection with the towage or transport," and at the end "or by any other cause of any kind in connection with the towage or transport."

As a matter of fact, the two tugs that were supplied had brought this vessel to her berth, and she had moored to the berth, and it is found by the learned judge, and it appears also in the evidence, that, so far as the actual getting close to the quay was concerned, it would be done not by the tugs, but by the ship's winches, and any further work would be done by the dock company because of their general supervision of the docks. That being so, the learned judge found that the damage was caused not by the tugs or their crews, not by the dock master, "but by the carelessness of the men he employed to cast off these barges from the buoy." If the barges had been properly cast off, especially the *Kate*, this

damage, caused by the tug swinging the *Kate* up against the starboard propeller of the *Marere*, would not have occurred. It cannot be said that when the dockmaster, finding the two tugs had finished their work and were lying idle, took a man from each of them, he had any right to do so unless he recognized that they had ceased to be the servants of the transporting company. By taking them he shewed that he himself recognized the fact that the contract, so far as the hire of the tugs was concerned, was at an end, and these men had passed back to his own service, and he had a right to claim their service.

In any view, whatever may be the proper mode of expressing it, and without adopting the exact language of the learned judge, I understand his judgment to mean that the towage and transporting contemplated by the contract had ceased. The two tugs and their crews were no longer engaged in that operation, and the dockmaster, finding the ship in her berth and knowing that she would in the ordinary course have to be hauled up close to the side of the quay, in order that she might do her loading work—the dockmaster, in the exercise of his general and proper jurisdiction, ordered the men to move away certain barges which he thought were where they ought not to be, having regard to the position of the *Marere*. The learned judge having found, and I myself should have come to the same conclusion, that the towage and transporting had ceased, it is impossible to extend the liability of the persons who are liable under the contract to an act which was independent of the transporting work, and only done by the dockmaster in the exercise of his general control over the dock.

Fletcher Moulton and Kennedy L.JJ. concurred.

Appeal dismissed.

Solicitors for appellants (defendants), the London and India Docks Company: *E. F. Turner & Sons.*

Solicitor for respondents (third parties), the Tyser Line, Limited: *Charles E. Harvey.*

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Jan. 28; March 4.

THE WALLSEND.

Admiralty—Collision—Removal of Wreck—Liability for Expense—Abandonment—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 77—*Costs.*

By s. 77 of the Thames Conservancy Act, 1894, it is provided, inter alia, that the conservators shall, in the case of a vessel sunk in the river, cause such vessel to be raised and sold, and, out of the proceeds of such sale, reimburse themselves for the expenses incurred, and, in case such proceeds shall be insufficient, "the deficiency shall be paid to the conservators by the owner of such vessel upon demand, and, in default of payment, may be recovered" as a debt:—

Held by Bargrave Deane J., that, on the true construction of this section, the conservators were entitled to be paid the deficiency by the owner of the vessel sunk whether that owner had, prior to the expenses being incurred for raising her, abandoned the vessel or not, and therefore, that question being immaterial, the defendants, the owners of the wrong-doing ship which came into collision with and sank the plaintiffs' vessel, must refund to the plaintiffs the amount of the deficiency which the conservators had recovered by action from the plaintiffs; but, as a matter of discretion, not the costs of defending the action brought by the conservators against the plaintiffs, as no one has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance of an action which he cannot defend.

Motion in objection to the registrar's report.

The plaintiffs were the Whitstable Shipping Company, Limited, and others, the owners of the fishing vessel *Lena*. The defendants were the owners of the steamship *Wallsend*.

The case turned on the construction to be placed on s. 77 of the Thames Conservancy Act, 1894, under which the conservators claimed to recover from the owner of a sunken vessel the excess of the expenses of raising her over the proceeds of sale, although it was alleged on behalf of the owner that he had abandoned the vessel before the expenses of raising her were incurred. The section of the statute is set out in the judgment.

The facts were shortly as follows:—

On December 2, 1905, a collision occurred in Sea Reach, in the river Thames, between the sailing vessel *Lena* and the steamship *Wallsend*. The *Lena* sank a few minutes after the collision in five fathoms of water, the crew being taken on board the *Wallsend*. On the following day the Thames Conservancy took

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possession of the *Lena*. They subsequently raised and eventually sold her for 1*l*. 15*s*. 6*d*. net, and in respect of the balance of their account of charges for hire of craft, tug, wages, &c., amounting to 355*l*. 14*s*. 10*d*., they sent in a claim to the plaintiffs as owners of the *Lena*.

The defendants, the owners of the *Wallsend*, admitted liability for the amount of the damage occasioned to the plaintiffs by reason of the collision, subject to a reference to the registrar assisted by merchants to assess the amount. On May 26, 1906, the registrar reported that the claim filed on behalf of the plaintiffs had been agreed between the parties at 1400*l*., with the exception of one item which was in respect of the charges claimed by the Thames Conservancy for raising the *Lena*. This item, on the application of the defendants, the owners of the *Wallsend*, the registrar (assuming that the actual amounts charged were reasonable and proper) disallowed, on the ground that "on the evidence the plaintiffs abandoned the *Lena* as a derelict before the work of raising her was commenced, without intention of resuming possession or ownership," so that the Thames Conservancy could not recover these charges against the plaintiffs personally, and, therefore, the defendants, the owners of the *Wallsend*, were under no legal liability for them as part of the damage occasioned by the collision. Secondly, that if the plaintiffs had not in fact abandoned the *Lena*, it was unreasonable for them not to have done so, and, therefore, if it had been necessary so to decide, the defendants, on this ground also, would not be liable.

Subsequently the Thames Conservancy brought an action against the owners of the *Lena* in the King's Bench Division, and obtained judgment for 355*l*. 14*s*. 10*d*., with costs and certificate for a special jury.

For insurance purposes the *Lena* was valued at 1385*l*., but of this amount only 370*l*. was insured, being the share of the vessel belonging to private persons other than the company.

1907. Jan. 28. *Aspinall, K.C.*, and *A. E. Nelson*, for the plaintiffs, the owners of the *Lena*, in support of the motion to vary the registrar's report by adding to their claim the item

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in respect of the Thames Conservancy charges. Whether the registrar found that the plaintiffs abandoned the *Lena* is immaterial, for it is a question of the construction of a statute, and it is submitted that the effect of s. 77 of the Thames Conservancy Act, 1894, is that the conservators are entitled to reimburse themselves for their expenses out of the proceeds of sale, and, if insufficient, the deficiency is to be "paid to the conservators by the owner of such vessel," that is to say, the owner of the vessel at the time she sank, and the right conferred by statute on the conservators cannot be defeated by any subsequent alleged abandonment. This construction of the Act is in accordance with the decision in *Howard Smith* v. *Wilson* (1), where it was held that s. 13 of the Victorian Marine Act, 1890, differed from s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, in that the deficiency was "chargeable to the owner of the ship," so that the registered owner at the date of the occurrence could not escape liability by abandoning the wreck to the underwriters, who, although they became at common law owners of the wreck, were not within the terms of the section.

Laing, K.C., and *D. Stephens*, for the defendants, the owners of the *Wallsend*. It lies on the plaintiffs to establish that the defendants have incurred a legal liability; but the registrar has found, on the plaintiffs' evidence, that they had in fact abandoned, and he further found that, if they had not, they ought to have done so. By the common law, if the owner abandons sine animo recuperandi he is not liable for the cost of raising, or for damage sustained by other vessels. In *The Snark* (2) the owners of a sunken barge were held liable for damage done because they had not abandoned her, for, if they had, there would not have been any responsibility resting on them either to remove her or to protect other vessels from coming into collision with her. It is not material that the jury at the trial in the King's Bench Division came to a different conclusion, for the question here is whether the defendants in this suit can be made responsible. Reliance is placed by the plaintiffs on *Howard Smith* v. *Wilson* (1), but that case is not applicable, for the wording of the Colonial statute is different, and throws upon the shipowner the

(1) [1896] A. C. 579. (2) [1900] P. 105.

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obligation to raise and clear the passage, whereas under s. 77 of the Thames Conservancy Act the duty of raising the wreck is thrown upon the conservators, and, therefore, the terms are more analogous to those of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847. In *The Crystal* (1) the House of Lords held, on the wording of that section, that the owners were not liable; because although owners of the ship when she became an obstruction, yet, having abandoned her before the expenses were incurred, they were not "the owners" at the material time, and were, therefore, not personally liable. That case was followed in *Barraclough* v. *Brown* (2), and the same construction applied to s. 47 of the Aire and Calder Navigation Act, 1889, by which the undertakers may recover the expenses of the removal of a boat, barge or vessel "from the owner."

Aspinall, K.C., in reply. The decision in *The Crystal* (1) turned on the construction of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, which contains the words "wreck" and "the owner of the same." Similar reasoning on the wording of s. 47 of the Aire and Calder Navigation Act, 1889, led to the construction adopted in *The Crystal* (1) being applied in *Barraclough* v. *Brown* (2); but *The Crystal* (1) is on account of that construction distinguished in *Howard Smith* v. *Wilson* (3), and abandonment shewn, on the wording of the Colonial Act, to have no effect on the statutory liability of the owner of the vessel during the last stage of its existence as a navigable ship.

BARGRAVE DEANE J. This case comes before the Court in the form of an objection to the registrar's report, and I agree with counsel for the owners of the *Lena* that the report of the registrar is not an order of the Court, but is simply a report to the Court.

It appears that the *Lena* was a fishing vessel owned by the Whitstable Fishing Company, and sank in the river Thames after a collision with the steamship *Wallsend*, owned by the defendants. The owners of the *Wallsend* admitted that they were responsible for the damage ensuing from the collision.

(1) [1894] A. C. 508. (2) [1897] A. C. 615.
(3) [1896] A. C. 579.

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The *Lena* seems to have been partly insured but not wholly insured, and she was a total loss. There being no dispute as to the liability of the *Wallsend*, the matter was referred to the registrar, assisted by merchants, to inquire and report to this Court as to the amount of the damage. The parties have agreed, as I understand, the amount recoverable, with the exception of one item, and that item was an amount which apparently was not at the time ascertained, but which represented the costs of the Thames Conservancy in raising the *Lena*. When before the registrar a witness on behalf of the owners of the *Lena* stated that they, that is, the owners, had abandoned the *Lena*. Upon that, it being apparent that the Thames Conservancy would make a claim against the owners of the *Lena* for raising the vessel, it was submitted to the registrar that it would be advisable that he should postpone his report, especially so far as that item was concerned, until it was ascertained whether or not the Thames Conservancy would bring an action and would recover, or would apply in this Court to recover, the amount, now stated to be 355*l.* 14*s.* 10*d.*

Before the registrar the cases of *The Crystal* (1) and *Barraclough* v. *Brown* (2) were cited, but the whole point of this case does not depend, in my opinion, upon the question whether there has been an abandonment of the *Lena* by her owners. The difficulty which I have about the matter is this, that the question of Aye or No, are the owners of the *Lena* responsible to the Thames Conservancy for the cost of raising the vessel, has been decided, not in this Court, but in the King's Bench Division in an action brought by the Thames Conservancy against the owners of the *Lena* for the amount I have stated. It has been held there, apparently, that the owners of the *Lena* are responsible. The question of whether or not the owners of the *Lena* abandoned the vessel may or may not have been decided, but I have no evidence to shew me whether that issue was ever raised before the learned judge and jury.

I am, therefore, left to deal with the case without that assistance, and I have to look to the section of the Thames Conservancy Act, 1894, which determines the question of the Thames

(1) [1894] A. C. 508. (2) [1897] A. C. 615.

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Conservancy's rights as against the owners of vessels which they raise. Other cases have been quoted to me besides *The Crystal* (1) and *Barraclough* v. *Brown* (2), such as *Howard Smith* v. *Wilson* (3); but those are cases which arose under different Acts of Parliament and under different conditions; and, although they may be usefully referred to by way of illustration, they do not really help me in deciding the question upon this particular section. What is the section? It is s. 77, and is as follows: "Whenever any vessel is sunk or stranded in the Thames the conservators shall cause such vessel to be raised or to be blown up, or otherwise destroyed, so as to clear the Thames therefrom"—now, that is a clear mandatory order upon the Thames Conservancy to do certain things. When a vessel has sunk she must be raised or destroyed—"and shall cause any such vessel and the furniture, tackle and apparel thereof . . . . which shall be raised or saved . . . . to be sold in such manner as they think fit, and out of the proceeds of such sale shall reimburse themselves for the expenses incurred by them under this section . . . . and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto." The words are remarkable—not in trust for the owner of the vessel, but "in trust for the persons entitled thereto." That might mean underwriters, or the owners of the cargo, or the owners and the crew representing their effects, or any person who, as a passenger, might have had property on board. The section concludes: "And in case such proceeds shall be insufficient to reimburse the conservators such expenses, the deficiency shall be paid to the conservators by the owner of such vessel upon demand." It does not specify the owner at any particular time, but says that the owner of a vessel sunk or stranded in the Thames shall be liable to pay to the Thames conservators any extra expense of raising the vessel beyond that which they could obtain by the sale of the vessel, or the proceeds of the sale of the cargo or property or effects on board that vessel.

Why should I read into that section of the Act of Parliament the words "provided that she has not been abandoned by the owner"? That is what I am asked to do. As the section

(1) [1894] A. C. 508. (2) [1897] A. C. 615.
(3) [1896] A. C. 579.

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stands, it says that when a vessel is sunk the owner of such vessel shall pay. It does not say, and I do not think I am entitled to read into it, "the owner of such vessel at the time such expenses are incurred, or at the time that such demand is made." It is plain, simple language: "The owner of such vessel" so sunk. It is the owner at the time she is sunk, and it seems to me that I can only draw one inference, and that is that the Thames conservators are to have this means of recouping themselves the cost of raising a vessel by recourse to the owner of the vessel so sunk, and, as I read it, to the owner of the vessel at the time that she was so sunk. I do not think the owner of a vessel can get rid of his vessel under this section by quietly saying, "I abandon." I do not think he is allowed to do that under this section. It would be so simple for the Thames Conservancy to be left in the lurch if that were to be read into the section. In my opinion this liability is a liability which attaches by law, and that is the decision which I make in this case, quite regardless of any decision which might have been given in the King's Bench Division.

Now, as far as I understand, the owners of the *Wallsend* were not represented in the King's Bench Division, and therefore that is another reason why I should, so far as that decision is concerned, hold that I cannot use it as against the owners of the *Wallsend*. There is one other matter relating to this motion which I have to deal with. It is said that the registrar has already decided this point by saying that in his opinion the fact of the abandonment of the vessel by the owners was established. I do not think so. The registrar has not come to a decision. He has only reported upon what happened before him, and he has reported practically that it was proved—that is to say, that it was given in evidence before him by a representative of the owners of the *Lena*. It is quite true that when pressed this witness said, "I abandoned her," but I do not think that the report of the registrar is binding upon me, and I am not at all prepared to say upon the facts as contained in the short-hand-writer's notes of the evidence that I should be satisfied the owners had abandoned the vessel. As I say, I am not bound by the registrar's decision. I am not satisfied that there was an

abandonment, and even if the master says, "I did abandon her," I do not think it comes within the Act of Parliament. I think the Act refers to the ownership of the vessel at the time she was so sunk in the river. For these reasons I think the report must be varied by including in the amount to be recovered from the owners of the *Wallsend* the sum of 355*l.* 14*s.* 10*d.*

The question of liability for the costs of the action in the King's Bench Division was reserved for further consideration.

March 4. BARGRAVE DEANE J. After I had decided the point raised upon the motion in objection to the report of the registrar a question arose as to costs, and counsel for the defendants suggested that in allowing the plaintiffs the costs of the motion I ought not to include the costs of the common law action which was brought by the Thames Conservancy against the plaintiffs to recover the expenses of raising the *Lena*.

The question arose in this way. The *Lena* having been sunk by the collision with the *Wallsend*, notice was given to the Thames Conservancy, who proceeded at once to raise her. Before the account was sent in to the plaintiffs they had commenced their inquiry before the registrar and merchants as to the damage occasioned to them by the collision. On learning the amount claimed against them, they applied to the registrar for leave to include in those damages the sum of 355*l.* 14*s.* 10*d.*, the amount which the Thames Conservancy claimed against them for raising the *Lena*.

The registrar, when asked to include those charges, said that if the Thames Conservancy elected to come in and have their claim considered on the reference he would deal with it. They preferred, however, to bring a common law action, and that action was brought. The plaintiffs defended it, and lost it, and the costs of that action were claimed by the plaintiffs against the defendants, the owners of the *Wallsend*, the wrong-doing ship.

The question is one of discretion; but at the same time I must be guided by certain principles. I find the principles are well set out in Mayne on Damages, 7th ed. p. 96, citing Lord Denman's dictum: "No person has a right to inflame his own

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account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend. (1) The question in these cases is, whether the plaintiff in defending the action did what a reasonable man would do under similar circumstances where he had no other judgment but his own to resort to; and accordingly, where the plaintiff's ship had been run down by the defendant, and the plaintiff had been forced to employ a steamtug, the owners of which claimed as salvage 150*l.*, and commenced a suit in the Admiralty Court; the plaintiff paid in 20*l.*, and was adjudged to pay 45*l.* more; held, that he could not recover the costs of this suit against the defendants; and Parke B. said it was like the case of repairs, in which it has been held that if the party chooses to stand the consequences of an action by the tradesman for the value of the repairs, he cannot charge the expense of that upon the party who did the original wrong, which made the repairs necessary." (2) Then there is another case, where a coal merchant of Dover sold certain coal to a steamship as good steam coal, he having purchased it from a coalowner with a certain warranty. The coal was found to be defective, and the shipowners brought an action against the coal merchant. The coal merchant asked the coalowner whether he ought to defend it. He did not get any answer, and to that extent did not get any authority from the coalowner; but he got a great deal of assistance in defending the action; and it was held in that case that, inasmuch as the coalowner who sold the coal to the merchant at Dover did assist in defending the action, there was, as it were, an authority from him to defend—that the coal merchant was doing it with the connivance and assent of the original seller. (3)

The principle is that you must not defend an action on behalf of somebody else without that person's consent. In this case I do not find that any application was made to the defendants when the Thames Conservancy brought their action. If the plaintiffs had gone to the defendants and said, "We have this action brought against us by the Thames Conservancy; do you

(1) *Short* v. *Kalloway*, (1839) 11 A. & E. 28, at p. 31.

(2) *Tindall* v. *Bell*, (1843) 11 M. & W. 228, 232.

(3) *Hammond* v. *Bussey*, (1887) 20 Q. B. D. 79.

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wish us to defend it?" then they would have known where they stood. The plaintiffs, however, took upon themselves to defend the action, and lost it, and I think they acted within the meaning of this statement I have read: "No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend." I do not think you can incur expenses of this sort, which you hope to recover subsequently from somebody else, without that person being cognizant of your action. For these reasons I think these costs cannot be allowed and must fall upon the plaintiffs.

Solicitors for plaintiffs, owners of the *Lena*: *Holman, Birdwood & Co.*

Solicitors for defendants, owners of the *Wallsend*: *Botterell & Roche.*

T. L. M.

[IN THE COURT OF APPEAL.]

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March 11, 12.

THE CLAN CUMMING.

Admiralty—Ship—Collision—Suez Canal—Relative Duties of North and South going Vessels—Regulations for the Navigation of the Canal, 1905, *arts.* 3, 8, *sub-ss.* 3, 7, 8, 10, *and Night Signal* 11.

Although it is the recognized practice in part of the Suez Canal for a south-going vessel to tie up in due time to allow a north-going vessel to pass, still, in their exercise of this right of way, those in charge of the north-going vessel have a relative duty cast upon them to act reasonably, and, therefore, they must reduce speed, and keep their vessel so well in hand as to be able promptly to bring her to a standstill should they find themselves approaching too near whilst the giving-way vessel is completing the manœuvre of making fast. These precautions are especially necessary at night owing to the difficulty of accurately estimating the distance of the lights of the south-going vessel before she exhibits the particular lights prescribed by the rules as an indication that the north-going vessel may safely pass.

APPEAL by defendants, the owners of the Clan Line steamship *Clan Cumming* and her freight, against a decision of Sir Gorell Barnes, President, pronouncing their vessel alone to blame for a

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THE CLAN CUMMING.

collision with the *Chatham*, owned by the plaintiffs, the Britain Steamship Company, Limited.

The case raised the question as to the relative duties of north and south going vessels in the northern portion of the Suez Canal.

The facts sufficiently appear from the following judgment, delivered December 9, 1905, by Sir Gorell Barnes, who was assisted at the trial, on December 7 and 8, by two of the Elder Brethren of the Trinity House :—

THE PRESIDENT. This is the case of a collision between the steamship *Chatham* and the steamship *Clan Cumming* in the Suez Canal on September 5 last. The *Chatham* is a steel screw steamship of 2174 tons gross, and she was bound from London and the Elbe to Bangkok and Yokohama with a cargo consisting of superphosphate, pig iron, coke, dynamite and detonators. The *Clan Cumming* is a larger steamer of 4808 tons gross, and she was bound from the East to London with a general cargo.

These two vessels met in collision at a point in the Suez Canal which is about nine and nine-tenths miles from Port Said, and the result was disastrous, because the *Chatham* was struck on her starboard bow and cut into nearly up to her windlass, and she stranded in the canal with her bows on the Asiatic side and her stern swung on to the African side, and although it has not been gone into at present, I think this was the case in which afterwards, in consequence of her blocking the canal, she had to be blown up by the canal authorities.

The other vessel is said to have been damaged, but we have not had anything specific put forward about that damage. I suppose some damage occurred in consequence of this collision to the bows of the *Clan Cumming*.

In order to understand the matter one must see how it was that these two vessels were approaching one another. According to the practice at this point of the Suez Canal—apparently it is not quite the same further down—the vessel proceeding to the southward has to tie up to posts on the Asiatic side of the canal whenever it is necessary for a vessel coming in the opposite

direction to pass her, and the vessel which is passing to the northward then approaches the spot where the vessel going southwards is tied up, and should of course slacken speed so as to pass in a proper way, and then, after she has passed, the southern-going vessel unties and proceeds. But there are certain regulations about lights which vessels have to carry, and about the lights which are to be shewn, and the way in which the lights should be dealt with by the vessel which is tied up so as to shew what she is doing. Vessels going through the canal, according to sub-s. 7 of art. 8 of the canal regulations, at night must have a searchlight or lights "shewing the channel 1200 metres ahead and so constructed as to admit of rapid splitting up of the beam of rays into two separate segments with a dark sector in the middle." As I understand, the object of that is that the lights there mentioned can be used so as to shew ahead and on the two banks of the canal, but if there is another vessel approaching they can put in the dark sector so as to cut off the light from immediately forward, leaving it still shewing on the banks, and then the other vessel which is approaching is not so much dazzled by the light as she would be if it were shewing straight forward. Then they also have to have "electric lights powerful enough to light up a circular area of about 200 metres diameter around the ship"; that light is called the arc light, and apparently is used when they are practically entering the siding in order to tie up. As soon as they become actually stationary (whether that is strictly in accordance with the rules or not I do not think it matters in this case) they put out the searchlight, they light the arc light, and they tie up. And then there are rules which provide what shall be shewn when they tie up, which I will refer to in a moment. But sub-s. 8 of art. 8 also says that "while navigating by night-time ships must carry their usual lights and have a man on the look-out forward," and then, "whenever a vessel navigating by night has made fast, whether in a siding or in the canal, she must, thereupon, at once extinguish her searchlight or searchlights, and the lights above stated, as well as her course lights." Then there is sub-s. 10 of the same article, which says that "whenever a ship makes fast, enters a siding, or gets aground, the captain must give immediate notice thereof by means of the signals

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specified in the appendix to these regulations." In the appendix to these regulations at p. 50 there is this notice, which is applicable to the present case; the page is headed, "Signals between ships under way," and there is a pennant at half-mast shewn for "I am moored—you can move on." That is for the day-time; but at night the note says, "At night signal No. 11 is replaced by a white light at the stem, a white light at the stern, as well as two white lights on the free side of the channel, at the level of the gunwale, in such manner as to divide the length of the ship into three nearly equal parts." Therefore, by the time the ship is in a position to be passed, her searchlight is out, her arc light is out, her course lights are out, and there are these white lights which I have just referred to on her to shew that she can then properly and safely be passed. Until that time has come she cannot with safety be passed, because, having regard to the narrow character of the canal, until she is well up into the bank—we are dealing with a part where there is no siding—the other vessel cannot safely pass her.

What is the result, then, in dealing with the way in which vessels must pass each other in this part of the canal? From what I have stated it is shewn that the southern-going vessel must carry the brilliant lights I will speak of in a moment up to the time when she gets to the siding. They must then be extinguished, and the white lights put in their places, and that amounts to a signal that the other vessel coming towards her can then safely pass. But I think that in doing that, if she is aware of the approach of another vessel, she must act reasonably. If she is proceeding to the south and meeting a vessel coming to the north, she must act reasonably by slowing down, stopping her engines and going to the siding at a proper and sufficient time to enable the other vessel approaching her properly to act for her by slowing down and passing when the proper signals have been given. On the other hand, the vessel proceeding to the north must watch what is happening ahead of her, and as long as the navigating lights are up, then she cannot attempt to pass, but must wait till the white lights to which I have referred on p. 50 of the rules are exhibited, and therefore she must watch and see that she does not get too near to the other ship, and for

that purpose must if necessary act reasonably by slackening her speed, so as to have herself properly in hand by the time she approaches the place where the other vessel is about to make fast.

I think—and the Elder Brethren think strongly upon this point—that, having regard to the impossibility of being certain at what distance the southern-going vessel is from the northern-going vessel, because of the impossibility of judging of the exact distance of the vessels by their lights, which is a well-known difficulty at sea, and is a probably increased difficulty having regard to the brilliance of the electric lights, the steamer proceeding to the north should keep herself well in hand, so that she is completely prepared to deal with any eventuality she may meet with—of finding herself too close to the ship which is going into the siding, and which may turn out to be stationary by the time she gets to her. In other words, if she has to pass a stationary ship she ought to be in such a position that she can control herself sufficiently to pull up without running into the stationary ship.

There is really very little dispute on the part of counsel who have conducted this case as to what I have said so far, but each complains that the vessel for whose owners his opponent appears acted in this case unreasonably, and so we proceed to see what the facts are which we have to determine.

According to the evidence of those on the plaintiffs' vessel, she had proceeded southward and tied up on two occasions before coming to the particular spot of the collision. On the first occasion I think one steamer had passed her, and on the second occasion two steamers had passed her, and this is the course which she seems to have taken on the two preceding occasions. On the first occasion she had been going full-speed ahead, at 5.30 she went half-speed, at 6 o'clock she went slow. There is another order at slow five minutes afterwards. Whether that is a dead slow order or a mere emphasis of the slowing order I do not know. At 6.8 she had gone full-speed astern, at 6.10 she had stopped. She had moved for a short way ahead about 6.11, and finally stopped at 6.12—that is to say, from the time of slowing to the time of being completely finished, apparently in her tied-up

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position, twelve minutes had elapsed; but ten minutes only had elapsed from the time of her going slow to the time of the first order to stop. The other two orders may possibly have been moving backwards and forwards in order to get her into her berth. On the second occasion this is what took place:—Having remained in this first tied-up place until about 6.28, she went full-speed ahead again, at 6.35 she went half-speed, at 6.40 she went slow, at 6.42 she went dead slow, at 6.45 she stopped, and went full-speed astern at 6.47, stop at 6.49, slow ahead at 6.50, and stop at 6.52. So that from the slowing at 6.40 to the first stop there is five minutes, and from slow at 6.40 to the final stop was twelve minutes. Those last two orders again seem to have been probably the orders just to get exactly at the position near the bank after really stopping. And then come the orders to the engines which immediately precede the present trouble. At 7.16 the order was given to stand by, and at 7.19 she went full-speed ahead, and it is at that full-speed ahead that she first noticed the *Clan Cumming*. She went half-speed at 7.30, and four minutes afterwards at 7.34 she went slow, dead slow at 7.36, dead slow again at 7.37, stop 7.38, full astern 7.40, stop 7.43, when the collision took place—that is to say, nine minutes from the time when the slow was given at 7.34, and thirteen minutes from the time when she had got half-speed, which is very much what had been done on the two preceding occasions, though she had, I think, been going on the first of those two occasions considerably longer at half-speed than on the last occasion. That is the record which the log shews, and it is substantially in accordance with the evidence given on the part of the plaintiffs.

The plaintiffs contend that they had by the time this collision occurred stopped so as to be stationary, not merely by the current, which was running at one knot at least, it may have been more, if the plaintiffs are right—both sides have pleaded one—but stationary by the bank. That is their contention, and they say that that is shewn by these facts—I mean the evidence states it; but the evidence is supported by these facts, namely, first of all, that the electric searchlight had been put out and that the arc light had been lighted—I forget at the moment whether that had actually been put out again before the blow was struck—but

that the searchlight had been extinguished, according to the master of the plaintiffs' vessel, from two to three minutes from the time of extinguishing it to the collision.

That is entirely disputed by the defendants, but I find this statement in the statement of the pilot of the defendants' ship, whose evidence has been read and taken at Port Said in a statement form, though not subjected to cross-examination, and therefore I do not think it ought to be relied on too much. There was a question put by the Consul as to whether seven minutes before the collision the *Chatham* had put out her electric light. The witness replied that this was done two or three minutes before the collision. It may be that that is exaggerated—possibly it is—by both the master already referred to and by the pilot. But at any rate I think it is clear that it had been put out at some substantial time before the collision actually happened, and therefore that would go, if that is the case, to shew that the vessel had become practically stationary at the point where she was preparing to tie up.

Then there are these other matters which do not seem to be much in conflict. First of all, that the boat which was to take a rope from the *Chatham* to a post on the shore had had the rope put into it, and had proceeded to row towards the bank. The anchor of the *Chatham* had been dropped—on the plaintiffs' side it is said it had been dropped and checked at fifteen fathoms—and then allowed to run slightly afterwards in order to take her head in towards the bank. On the other side it is said that the chain continued running out, but I think the plaintiffs are more likely to be correct about that statement than the defendants, who only hear something. Finally, I think the vessel is said to have had a slight angle to the bank at the time of the collision, and it is also said that the *Clan Cumming* had angled across some couple of points or so, probably under the reversing of her engines about the time when the blow was struck.

All these matters, together with the evidence in the case, lead me to the conclusion that the *Chatham* had in fact become a stationary ship by the bank at the time when the collision happened, and that she had acted for this vessel very much in the same way as she had acted for the three preceding vessels

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on the two preceding occasions when it had been necessary for her to tie up to the bank.

That being so, I think the rest of the case follows almost as a matter of course. I do not think it does entirely, because a point has to be dealt with which counsel for the defendants have pressed very strongly in this case; but at any rate it is clear that there was a violent collision, the extent of which is shewn by the fact that the *Clan Cumming* cut into the bow of the *Chatham* to such an extent as to approach near to the windlass at the time when the *Chatham* was angling slightly to the bank, and the other vessel, for reasons which I have already stated, was heading more to the bank. And I think it follows from this, together with certain statements made in the course of the evidence from the defendants, which are more particularly these, and are found in the cross-examination of the master of the defendants' vessel, namely, that he had stopped, but that at that time he knew that the other vessel had not tied up, and his ship, the defendants' ship, was fully a ship's length off when the engines on the defendants' ship were reversed; that when they reversed they had two knots or three knots way, and that it was half a ship's length off when the light went out. I think it follows that, having found what I have already stated, and having regard to the evidence given in the case, that the *Clan Cumming* still had considerable way on her at the time when she came in contact with this ship, and that was what did the damage to the *Chatham*.

On this point the question comes to be, whether the defendants have acted reasonably in what they have done in this case. With regard to that, I find in the preliminary act of the defendants this statement: "At about 7.30 P.M. a long warning blast was sounded on the steam whistle of the *Clan Cumming*" —possibly that was too far off to be heard; at any rate, that shews that those on board the *Clan Cumming* were aware that they would have to take action not to approach the other vessel in any state of danger—" and about a quarter of an hour later, as the searchlight of the *Chatham* continued to be visible, this signal was repeated. About five minutes later as the *Chatham* continued to approach her searchlight still remaining visible

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the engines of the *Clan Cumming* were put to half-speed and shortly afterwards to slow and after another short interval were stopped. Almost immediately afterwards the engines were put full-speed astern three short blasts were sounded on the steam whistle which signal was repeated several times and the helm was put hard-a-starboard and shortly afterwards the port anchor was let go and held on to." Turning from that statement to the engineers' log-book of the *Clan Cumming*, I find this entry: "While proceeding through canal—half at 7.52, slow 7.54, came up to ss. *Chatham* on her way from Port Said to Suez," and then in brackets "(stop 7.55 P.M., full astern 7.56, stop 7.59 P.M.)." So that according to that record the engines are put full-speed astern within four minutes after the time when they have been put to half-speed. Taking these matters into consideration, and taking them as probably stating this matter as well as it could be done for the defendants, it is established, both in the opinion of myself and in the opinion of the Elder Brethren—who are much more competent to judge of this point than I am, because it is a purely nautical one—that the defendants did not act reasonably in approaching the *Chatham*, having regard to the indications which they had ahead of them at this time. On this particular point I am glad to find that I have the assistance of one of the Elder Brethren who has had large experience of the navigation of the Suez Canal.

I think it is true that both these vessels were originally going faster than art. 3 of the regulations of the Suez Canal—which says five-and-a-third nautical miles per hour—seems to allow. I suppose, though I cannot assume it entirely, that that was originally meant to provide that vessels should not go so fast as to do injury to the Suez Canal banks. Both of them were going faster than that; they were not going at anything of a high character of speed in this case, though they were going faster than that. If one is to decide which of these two vessels was going the faster, the conclusion, I think, is in favour of the view that the defendants' ship was going the faster of the two. That is very much borne out by the evidence which has been given, partly from the plaintiffs' side and partly from the defendants' pilot, as to what was the relative position of these two vessels at

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the time when they were passing the signal stations. On the side of the plaintiffs it is said that at the time they passed Ras-el-Ech they hailed to the shore and found from the answer that the approaching ship had passed another signal station (24 kilometre) five minutes before. The evidence from the defendants is in the pilot's statement that at 7.20 they saw at station kilometre 14 a red lantern which signified that a steamer had just passed from the opposite direction of the canal, and then he proceeds to describe what happened, and the substantial effect of his evidence seems to me to accord with what I have already said was given by the plaintiffs. If that is worked out it rather tends to shew that the greater speed at the spot in question was on the *Clan Cumming*. Therefore it may be said that each of these vessels was going at more than was properly allowable according to the rule. But I do not think that that makes any difference so far as the plaintiffs are concerned in this case, and for this reason, that they had for a time gone full-speed, according to the entry in the log which I have read; but they had taken off that full-speed at 7.30, that is, thirteen minutes before the collision happened; at 7.30 they had gone half-speed, and at 7.34 they had gone slow; and when one recollects the answers that were given to plaintiffs' counsel by the defendants' master it will shew, I think, that this point really makes no difference to the position of the plaintiffs in this case. What he said was: "It is very difficult to judge the distance. I had no idea at all how far off the ships were when I put the engines half-speed astern; before that I had blown two long blasts. I knew we were nearing the ship," and so on. That emphasizes what I have already said about the necessity for care in approaching an object the distance of which is unascertained, and in this I am not speaking so much against the master, because the master has told us that his vessel was practically in the hands of the pilot, who is accustomed to navigate the canal, and therefore the person best able to judge what ought to be done and how near the two ships ought to approach. I am using this evidence to shew what the fact was. It emphasizes what I have already said about the danger of approaching a vessel whose distance cannot be ascertained, when, if the facts are as I have found them, that you find afterwards

you are still going at such a pace when you get to this ship, she being stationary, having reduced her speed some twelve or thirteen minutes before, that you strike her and do serious damage to her. That is not keeping your ship in such control that you can, to use the expression of the Elder Brethren, deal with the eventualities you find you have to deal with when you approach close to a ship which up to that time has been exhibiting to you her searchlight and her navigation lights—in other words, telling you that you must not come on yet—and which has not yet exhibited the signal referred to at p. 50 in the book, namely, "I am moored—you can move on.'

I have given this case the best consideration I can give to it owing to the magnitude of it, but I think that the blame of this collision rests solely with the navigation of the *Clan Cumming*, and that is the view of those who in this class of case, in view of the facts I have found, are far more competent than I am.

That being so, the *Clan Cumming* must be found alone to blame for this collision.

On appeal. (1)

1907. March, 11, 12. *J. A. Hamilton, K.C., Aspinall, K.C.*, and *Balloch*, for the appellants (defendants), owners of the *Clan Cumming*. The arguments of counsel were directed to the point that, on the evidence, the *Chatham* was alone to blame for not manœuvring into position in due time to allow the *Clan Cumming* to pass in safety. These arguments sufficiently appear from the judgment of the Lord Chief Justice. With reference to art. 3 of the regulations for the navigation of the Suez Canal, by which "the maximum speed of all ships passing through the canal is fixed at 10 kilometres equal to $5\frac{1}{3}$ nautical miles per hour," the case of *The R. L. Alston* (2) was cited to shew that the speed per hour meant the speed over the ground. Reference was also made to *The Skipsea* (3) on the question of the relative duty incumbent upon vessels, when navigating in narrow waters, to act reasonably towards one another.

(1) Heard, by consent, by two judges of the Court of Appeal, assisted by two nautical assessors.

(2) (1882) 8 P. D. 5.

(3) [1905] P. 32.

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Laing, K.C., Scrutton, K.C., and *H. C. S. Dumas*, for the respondents (plaintiffs), owners of the *Chatham*, were not called upon.

LORD ALVERSTONE C.J. This case is one of very great interest, and has been extremely well argued, but I see no reason for differing from the conclusion at which the learned President has arrived.

The position of the vessels as they approached one another undoubtedly involved mutual duties on the part of both ships, and responsibilities towards the other ship on the part of each ship, and if counsel for the appellants could have made good their argument that this collision was really caused by the neglect of those in charge of the *Chatham* to tie up soon enough, in view of the fact that a vessel, the *Clan Cumming*, was coming northward, up the canal, they would, in my judgment, be perfectly entitled to say that the *Chatham* was solely to blame for the collision. I recognize to the full that there is for the mutual convenience of vessels using the canal a direction by rule, or a practice recognized by all vessels navigating the canal, that the south-bound ship is to tie up and the north-bound ship is to keep on. That means that each is to act reasonably and with proper regard to the danger and risks of navigation in the discharge of its respective duty. If I thought that the facts of this case pointed in the direction that counsel say—that this collision was really caused by there being too much way upon the *Chatham*, due to her not having manœuvred to tie herself up at a sufficiently early period, and that the impact which was caused undoubtedly by the reverse action of the screw of the *Clan Cumming*, was because the *Clan Cumming* reversed, being put in difficulty by the conduct of the *Chatham*—I should agree to the arguments to which we have listened.

Now, the duties of the vessels rest partly upon rule and partly upon practice. So far as the matter is governed by rule, the rules provide that both vessels are to have, in addition to the three ordinary lights, a searchlight capable of being divided by a sector in the middle, and an electric light called the arc light, which will illuminate a distance of 200 metres round the ship.

The rules provide that when a ship makes fast, going south, all the lights I have referred to—searchlight, arc light, and navigation lights—are to be put out, and are to be replaced by one light at the bows, one at the stern, and two at the side It appears to have been recognized by both masters that there is superadded to the rules a custom of extinguishing the searchlight when the way is practically off the ship, and keeping the arc light up till the vessel is finally tied up. It does not, in my judgment, make any substantial difference in this case. I agree with the argument addressed to us on behalf of the appellants that the searchlight was put out, comparatively speaking, a short time before the actual collision. Whether it was when the *Clan Cumming* was at a distance of not more than a quarter of a mile is not very material, because I agree with the view taken by the learned judge that the *Clan Cumming* was coming up too fast and was not sufficiently regarding her duty towards the vessel coming south.

Having dealt with the lights, the learned judge describes the duties of the two ships towards one another. He says the underway lights must be extinguished and the white lights put in their places, and that "that amounts to a signal that the other vessel coming towards her can then safely pass. But I think that in doing that, if she is aware of the approach of another vessel, she must act reasonably. If she is proceeding to the south and meeting a vessel coming to the north, she must act reasonably by slowing down, stopping her engines, and going to the siding at a proper and sufficient time to enable the other vessel approaching her properly to act for her by slowing down and passing when the proper signals have been given. On the other hand, the vessel proceeding to the north must watch what is happening ahead of her, and as long as the navigating lights are up, then she cannot attempt to pass, but must wait till the white lights to which I have referred on p. 50 of the rules are exhibited, and therefore she must watch and see that she does not get too near to the other ship, and for that purpose must, if necessary, act reasonably by slackening her speed, so as to have herself properly in hand by the time she approaches the place where the other vessel is about to make fast." No language

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of mine, in my opinion, could possibly improve upon that statement of the duty of the two ships, and I most willingly adopt it as the basis of my judgment in considering what were the relative duties of the ships and how far they did or did not comply with them.

The conduct of the *Chatham* is mainly attacked upon the ground that she was acting too late. Of course, if I had any reason to think that the log-book entries had been prepared in any way so as not really to represent the facts, I should hesitate to act upon them, but we have this fact, that, according to the record in the log-book, the *Chatham* had tied up twice before in the course of her passage down the canal, and I agree that the period of time that elapsed between the first manœuvre towards making fast and the actually being made fast was practically twelve minutes. On this occasion, so far as we can gather from the log of the *Chatham*, the manœuvring began at 7.34, and ended at 7.43. That is a total period of something like nine minutes. Of course, after the way has been taken off the ship she has to be tied up. I agree that in all probability the boat is lowered while she has some speed upon her through the water, and of course there is a slight run over the land. Having regard to the fact, however, that the boat was in course of going to the land, I think the condition of things points to very nearly the end of the manœuvre of tying up. Therefore I am unable to say that there is any substantial ground for thinking that the position of difficulty was brought about by any undue speed on the part of the *Chatham*, or any undue hesitation or neglect to take proper manœuvres to tie up. I am by no means satisfied upon the evidence as it stands that the learned President was wrong in coming to the conclusion that the *Chatham* was not to blame in this matter. That does not exhaust the matter, because we have to consider the action of the *Clan Cumming*. I agree that the fact that both these vessels had been going faster than five and a third knots is not very relevant. On the other hand, speaking generally, I think a vessel which has to tie up is entitled to assume that the vessel coming up is not substantially exceeding that speed at which she is entitled to go in the canal. I do not wish to press that too far, because I do not want to deal with it in any way as

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being a matter of blame. The abstract fact is that the *Clan Cumming* was going fast; but when I regard the evidence as to distances travelled by one and the other from points which are ascertained and specified in the judgment, I certainly come to the conclusion to which the learned President has come, that the *Clan Cumming* was going much the faster through the water. But, again, I do not think that would have been enough unless the collision had been brought about by such excessive speed or want of care; and the substantial ground upon which I agree with the opinion expressed by the learned President is this, that I think, on the cross-examination of her master, the *Clan Cumming* was being allowed to come on at much too great a rate of speed, in ignorance of the distance—the actual distance—between the searchlight ahead of her and herself. I do not wish to read any detailed passages, but I would call attention to those pages of the record which set out the cross-examination of the master of the defendants' ship by the leading counsel for the plaintiffs, and perhaps I may be allowed to say, from long experience, that I have seldom read more effective cross-examination of any witness, all the more effective because, having made points as he went along, the learned counsel did not attempt to argue with the witness. The impression made upon me was that, at the end of that cross-examination of the master, counsel for the plaintiffs had demonstrated to my mind, and I think to the President, that the master was coming up too close in ignorance of the distance of the searchlight of the *Chatham* away from him.

I come to the conclusion that this collision was in fact caused by the north-going ship keeping too high a rate of speed, neglecting to put herself under sufficient command when approaching a vessel which she had no right to pass until the searchlight and arc light were put out. From that point of view it really becomes immaterial whether the searchlight was put out shortly before the collision or not. It tells rather more against the *Clan Cumming* if it be the fact that the searchlight was put out a short time before the collision.

The learned President came to the conclusion that the *Clan Cumming* did not keep herself under proper command. It was

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her duty not to pass until the lights were extinguished, and she allowed herself to get too close to the ship, which she might easily have avoided, and then, at the last moment, she adopted the drastic measure of reversing full-speed astern, and, in fact, still having substantial way upon her, her stem cants to starboard, and she comes into collision with the *Chatham*. In my opinion, the judgment of the President must be upheld.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons.

Appeal dismissed.

Solicitors for appellants (defendants), owners of the *Clan Cumming*: *Hollams, Sons, Coward & Hawksley.*

Solicitors for respondents (plaintiffs), owners of the *Chatham*: *Botterell & Roche.*

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July 25.

OLDROYD AND OTHERS *v.* HARVEY AND OTHERS.

Probate—Will and Codicils—Construction—Form and Position of Writing forming Second Codicil

A testamentary document, whether will or codicil, requires no special form of words.

Where a document, duly executed and propounded as a second codicil, was written wholly on one page of one piece of paper, and formed, according to the evidence given in support of it, one transaction, it was held to be entitled to probate along with the will and first codicil, although a material portion of the second codicil was written in a space above the signatures to the first codicil.

THE plaintiffs, George Edward Oldroyd, James Wright, and Willie Rowley Wilkinson, as executors, propounded for probate in solemn form of law the will and two codicils of William Lunn, deceased, and they claimed that certain words which in fact appeared above and on either side of the testator's signature to the first codicil, and wholly above the attestation clause and signatures of the attesting witnesses to that codicil, formed part

of the second codicil, and should be admitted to probate as part of the second codicil.

The testator was a retired book-keeper, and he died on November 22, 1906.

The will was dated July 9, 1898, and was contained on the front of five sheets of brief paper.

The first codicil, which was dated December 5, 1903, covered the back of the first sheet and about half of the back of the second sheet of the paper on which the will had been written.

Both these earlier documents were prepared and attested by the testator's solicitor, and no question arose as to either of them.

In 1905, having suffered considerable losses in his investments, the testator set about making a second codicil, and this he did without employing a solicitor.

He proceeded to write this second codicil upon the back of the second sheet of the will. He commenced to write, in a space above the attestation clause and above and on either side of his own signature to the first codicil, as follows: "Upon second consideration I revoke the sum of five hundred pounds herein named for a stained glass window in Dewsbury Parish Church, and in consequence of the great depreciation of shares I revoke the sums of 1000*l.* each to the Dewsbury and Huddersfield Infirmaries."

On the same page, but below the attestation clause and signatures of the witnesses to the first codicil, the testator continued as follows: "I the within-named Henry Lunn hereby declare this to be a codicil to my within-written will. I revoke the legacies of two hundred and fifty pounds each bequeathed to the within-named Emma Crosland and Joseph Stocks, and to the said Emma Crosland, in lieu of above legacy, I bequeath an annuity of five shillings per week, to be paid quarterly from my decease.

"Witness my hand this nineteenth day of January, 1905.

"William Lunn."

Then followed a full attestation clause and the signatures of the two attesting witnesses, the document being duly executed in accordance with the provisions of the Wills Act.

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The facts were not in dispute. No witnesses were called by the defendants; and evidence having been led on behalf of the plaintiffs formally to prove the facts,

J. Alderson Foote, K.C., and *Durley Grazebrook*, for the plaintiffs, submitted that the second codicil was entitled to probate. There appears to be no reported case where the execution of a second codicil has been held to confirm interlineations in a first codicil; but rule 8 of the Non-Contentious Probate Rules, 1862 (1), clearly shews that the execution of a codicil confirms all interlineations and alterations in a previously executed will to which it is a codicil. If the words now in question are not held to form part of the second codicil, they should be considered as an interlineation in the first codicil which is confirmed by the execution of the second: *In the Goods of Bradley* (2); *Tyler* v. *The Merchant Taylors' Co.* (3); *In the Goods of Heath.* (4)

BARGRAVE DEANE J. I think that the strength of your case is as put forward in your pleadings, namely, that the words which appear interlined in the first codicil really form part of the second codicil.

W. A. Peck, for the vicar and churchwardens of Dewsbury Parish Church and the treasurer and trustees of the Huddersfield Infirmary, some of the defendants. The words in question are an interlineation in the first codicil; and, having been inserted after its execution, they cannot be admitted to probate. The second codicil cannot be set up as confirming an unattested alteration in the first codicil: *In the Goods of Hutton* (5); *In the Goods of Phelps* (6); *Burton* v. *Newbery.* (7) The proposition put forward in the plaintiff's pleadings is untenable, especially in

(1) Rule 8 is as follows:—

"Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will or by the subsequent execution of a codicil thereto."

(2) (1847) 5 Notes of Cases, 186.

(3) (1890) 15 P. D. 216.

(4) [1892] P. 253.

(5) (1847) 5 Notes of Cases, 598.

(6) (1849) 6 Notes of Cases, 695.

(7) (1875) 1 Ch. D. 234, at p. 237.

view of the position and wording: "I the within-named Henry Lunn hereby declare this to be a codicil to my within-written will," which clearly is the beginning of the second codicil.

BARGRAVE DEANE J. This case raises a new point. I am not aware of any case exactly like it.

The testator executed his will on July 9, 1898, and thereby left certain legacies, including a legacy of 500*l.* for a stained glass window in Dewsbury Church and two gifts of 1000*l.* each to the Dewsbury and Huddersfield Infirmaries.

In December, 1903, he executed a codicil by which he altered certain bequests to private persons, but in all other respects confirmed his said will; and, therefore, that will and that codicil became one effective document expressing his will.

In January, 1905, by which time he had met with certain losses, as proved before me by his solicitor's managing clerk, the testator came to the conclusion that he could no longer afford to leave the legacy of 500*l.* and the two legacies of 1000*l.* each before mentioned, and accordingly he was foolish enough to set about doing what he wished himself, instead of getting his solicitor to come and do it for him.

The will and codicil I have mentioned are written on the same paper, the will on the face and the codicil on the back of the first two sheets, on the second of which some space was left after the signature and attestation. When he began to write his second codicil, he told one of the witnesses that, by reason of not having enough money left, he could not leave all the legacies mentioned in his will. He sat down and wrote straight off two paragraphs. The first of these paragraphs he wrote in a small space above and on either side of his signature to the first codicil; and then, without rising from his chair, he wrote the second paragraph and the rest of the second codicil. It is argued that the second paragraph must be taken, from its wording and position, to be the beginning of the second codicil. That is a mistaken view. The words "I the within-named William Lunn hereby declare this to be a codicil to my within-written will" might have been written at the end of this second codicil.

These words are themselves of no special value or effect

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whatever. It is perfectly well-known law that a testamentary document, whether will or codicil, requires no special form of words. He began the second paragraph by declaring the document he was writing to be "a codicil" to his will. Then, having completed the attestation clause, he signed his name to the document, as a codicil, in the presence of the witnesses, and they attested it in his presence.

Two suggestions are now put forward on behalf of those who are setting up this last document. The first is that the paragraph which forms an interlineation in the first codicil has been confirmed by the mere fact of the testator making a subsequent duly executed testamentary disposition referring to his will and declaring the document in question to be "a codicil" to his will. In other words, it is said that by executing the second codicil he gave effect to the words interpolated in the first codicil. The second of the arguments put forward on behalf of the plaintiffs is that the words inserted in the first codicil are not part of that codicil at all, but are in fact part of the whole second codicil, because written on the same piece of paper and on the same page, and as forming part of one transaction.

On the other hand, it is argued that the first paragraph which the testator wrote cannot be admitted as part of the first codicil. That is undoubtedly so, and the plaintiffs have never contended the contrary. It is further urged that the paragraph in question was inserted in the first codicil under a mistaken idea of law, the testator not realizing that the words could have no effect as part of the first codicil without re-execution of that document.

I do not know that I quite follow that argument. But when one finds that the testator did what he undoubtedly did all at one and the same sitting, I cannot see why he should wish to divide the document up. In my view, we must not be ultra-technical, if we can possibly avoid it. Look at the man's intention. It is clear what it was from the evidence. His intention was to revoke the legacies in question. He had one of the attesting witnesses actually present when he wrote out what he wished done. The form in which he expressed himself is, as I have already said, immaterial; the substance is the question, and that is disposed of by Mr. Beaumont, one of the attesting witnesses,

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who heard him declare his intention and give his reasons, and who saw him sit down and write the whole right off.

I am not sure whether this is a re-execution of the first codicil as altered; he may have intended, and probably did intend, that his signature was to confirm that first codicil as altered. But, if not, it is perfectly clear that the testator intended his signature to be an execution of the particular document which he had written out in the particular way described. I hold, without doubt or hesitation, that the first paragraph forms part of the second codicil, and I direct that it be included in the probate and be given effect to as forming part of the second codicil. I grant probate of the will and two codicils.

The costs of both parties must come out of the estate.

Solicitors for plaintiffs: *Ridsdale & Son, for Chadwick, Son & Nicholson, Dewsbury.*

Solicitors for defendants: *Iliffe, Henry & Sweet, for Laycock, Dyson & Laycock, Huddersfield.*

H. D.

Distinguished. JEFFREY v. JEFFREY [1951] P. 32

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July 17, 29, 30.

Divorce—Practice—Suit for Dissolution of Marriage—Decree Nisi—Expiration of Six Months from the Date of the Decree—Motion by Respondent to dismiss Petition for Non-prosecution — Adjournment — Decree Nisi rescinded and Decree of Judicial Separation pronounced at the Instance of the Petitioner.

A petitioner is entitled to a reasonable time after the expiration of the time at which the decree could, at the earliest possible date, be made absolute, in order to determine whether to proceed further or to have the petition dismissed.

Upon an adjourned motion by a respondent to dismiss a suit for want of prosecution, the Court allowed the petitioner to take a decree of judicial separation in place of the decree nisi previously obtained for dissolution of the marriage.

MOTION TO DISMISS.

The parties were married in 1900, and on November 1, 1906, a decree nisi for the dissolution of the marriage was pronounced, on the ground of the cruelty and adultery of the husband.

In July, 1906, alimony pendente lite was ordered, and after an

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inquiry before the registrar, the Court, by order dated May 14, 1907, refused the wife's application for an increase of the alimony and directed that the costs of and incidental to the said application should not be taxed against the husband.

On June 17, 1907, the respondent (husband) moved to dismiss the petition.

Bayford, in support of the motion. The respondent, being the guilty party, cannot apply to have the decree made absolute, but he is entitled to have the petition dismissed for want of prosecution as soon as the six months from date of decree nisi have expired and no step has been taken by the petitioner to have the decree made absolute. [He referred to *Ousey* v. *Ousey and Atkinson* (1); *Halfen* (otherwise *Boddington*) v. *Boddington*. (2)]

Crawford, for the petitioner. The motion is premature. Only about six weeks have elapsed since the earliest possible date when the decree in this case could have been made absolute. It is only reasonable to allow a petitioner a longer period of time so that she may make up her mind as to what course she intends to pursue. Instead of either applying to have the decree made absolute or having the petition dismissed, she may desire, as an alternative, to have the decree amended by turning it into a decree for judicial separation, so that, if the respondent's means increase, she may be in a position to obtain an increased allowance.

BUCKNILL J. I shall adjourn this application till the last motion day before the long vacation. That will give the petitioner sufficient time, in my opinion, to make up her mind as to what is really her wish.

July 30. On the application of *Barnard, K.C.* (*Crawford* with him), for the petitioner, the COURT (Bucknill J.) rescinded the decree nisi, and, without further petition or hearing, pronounced a decree of judicial separation, with costs.

Solicitors for respondent (husband): *Charles Butcher & Sons.*
Solicitors for petitioner (wife): *Wells & Sons.*

(1) (1875) 1 P. D. 56. (2) (1881) 6 P. D. 13.

H. D. G.

BATER *v.* BATER and Others.

1907

July 19.

Divorce—Practice—Foreign Marriage—Proof—Expert Evidence.

Expert evidence is required to prove the validity of a foreign marriage, even though in a suit previously determined in this Division, between the same petitioner and respondent, to annul that marriage, it has been proved and admitted that the marriage was valid upon the assumption that a decree of divorce, upon which the capacity of the parties to contract the marriage depended, was a valid decree.

Husband's suit for dissolution of marriage.

The circumstances leading up to the marriage appear in the report of the nullity suit of *Bater* v. *Bater* (otherwise *Lowe*). (1) It was admitted, both in that suit and in this, that the ceremony of marriage in New York was valid, assuming (as was found in the nullity suit) that the parties were at liberty to marry. The experts on American law, called on both sides in the nullity suit, never questioned the validity of the marriage if the previous divorce was valid.

The petitioner having been called and given evidence, and witnesses having been called to prove that the respondent had committed adultery, the record of the proceedings in the nullity suit and the report of the hearing and appeal having been put in, the case was closed.

Hammond Chambers, K.C., and *H. Durley Grazebrook*, for the petitioner, asked for a decree.

Barnard, K.C., and *W. O. Willis*, for the respondent, did not contest the case.

Bucknill J. I must have expert evidence of the validity of the marriage.

Hammond Chambers, K.C., and *H. Durley Grazebrook*, for the petitioner. That would be so if this marriage had not already been adjudicated upon in this Court and in the Court of Appeal in a suit between the same petitioner and the same respondent. The validity of the marriage, assuming the previous divorce to have

(1) [1906] P. 209.

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been good, was never questioned either by experts, by counsel, or by the Courts. The head-note of the report of the nullity suit (1) states in terms that "in 1893 the wife went through a ceremony of marriage with B. (the petitioner) in New York, which, assuming they were then at liberty to marry, was a valid ceremony."

BUCKNILL J., nevertheless, insisted upon an expert witness being called in this suit; and, after an adjournment, one of the American lawyers, who had given evidence in the nullity suit, attended and gave formal evidence as to the validity of the marriage, whereupon a decree nisi for dissolution of the said marriage was pronounced.

Solicitors for petitioner: *Ridsdale & Son, for J. Shakespeare Smith, Liverpool.*

Solicitors for respondent: *A. de Frece, for W. H. Quilliam, Liverpool.*

H. D. G.

1907

July 29.

GETTY *v.* GETTY.

Divorce—Practice—Evidence—Confession of Adultery.

Although it is the general practice in matrimonial cases not to act and grant relief upon uncorroborated confessions of adultery, there is no absolute rule of practice and no rule of law precluding the Court from acting upon such uncorroborated evidence.

The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true.

If so satisfied, it is open to the Court to grant relief, notwithstanding the absence of independent corroborative testimony.

Semble, a solicitor who has acted for the respondent is a compellable witness; and his evidence as to statements made by the respondent may be accepted by the Court in coming to a conclusion as to the truth of a confession of adultery made by the respondent.

THIS was the petition of the husband, William Getty, praying for the dissolution of his marriage with the respondent, Caroline Bertha Getty, on the ground of her alleged adultery "in or about

(1) [1906] P. 209.

the year 1886, at a place unknown" to the petitioner, "with a man whose name is unknown" to the petitioner.

Barnard, K.C. (*W. O. Willis* with him), in opening the case for the petitioner, said that it rested on a confession by the wife. They referred to *Robinson* v. *Robinson and Lane* (1); *Williams* v. *Williams and Padfield.* (2)

The marriage was solemnized on July 22, 1885, at St. Martin's Church, Patternewton, in Yorkshire. The parties cohabited at Alexandria, where the petitioner carried on the business of a cotton merchant.

On February 9, 1886, the petitioner saw the respondent, who was then about twenty-one years of age, off to England with her young sister, and he received a letter from his wife posted at Malta; but after her arrival in England he received no direct communication from her.

In June, 1886, the petitioner returned to England, and, as he stated in his evidence, tried to find his wife, but being, as he said, very ill at that time, he could not pursue those inquiries. In 1887 and 1888 he did not trace her, though he again visited England. In 1888 he received a letter from his wife's sister, in consequence of which he sent 20*l.* to the sister to be sent by her to the respondent in the sister's name. This sum of 20*l.* was returned to the petitioner by the respondent's solicitors.

From 1886 to 1899 the petitioner never saw or heard from his wife.

In 1899 he commenced a suit for restitution of conjugal rights, in answer to which the respondent set up a charge of cruelty.

The case came on about the middle of 1900, and the wife gave evidence as to the alleged cruelty. The case was adjourned for evidence to be taken in Egypt. The husband was ready, at the proper time, to give evidence in denial of the alleged cruelty. When the case came on again, however, after the Long Vacation in 1900, terms were arranged for a deed of separation, which was executed in due course.

At the end of the year 1904 or the beginning of 1905 the

(1) (1859) 1 Sw. & Tr. 362. (2) (1865) L. R. 1 P. & M. 29.

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petitioner received from his wife a letter in the following terms :—

"My dear William,—I am a Christian scientist. I became interested in science from the healing of E——'s husband, who was supposed to have an incurable disease.

"I believe that God is the Divine principle of life, truth, and love. I want to possess the consciousness of truth, and cannot do so while I am not truthful with you.

"I was unfaithful to you nineteen years ago, and I regret bitterly the wrong I have done you.

"This statement sounds bald, but it is too ugly to dress up in fine phrases.

"Yours very sincerely,

"Caroline B. Getty."

From about the date of the confession the respondent had declined to accept any income from the trustees of the settlement, who had since been investing the income as it came to their hands.

In the summer of 1906 the petitioner came to England, and several interviews took place between Mr. William Reilly, the managing clerk to the petitioner's Liverpool solicitors, and Mr. Charles Lupton, who at that time represented the respondent, but who was stated not to be the solicitor acting for her in the present proceedings.

At one interview which was arranged for July 17, and at which the petitioner, Mr. William Reilly, and Mr. Charles Lupton were actually present (the respondent being within call), the latter stated that he was not prepared to furnish any further information then; and at a later interview, on September 12, he said that he was not prepared to furnish the name of the man with whom the admitted adultery took place, nor the date when or place where it was committed; but he stated that it did not take place at Alexandria, but shortly after the respondent's arrival in England, but not in any hotel, and that the attachment was of only short duration; and he added that the respondent did not think it right, after so many years, to bring trouble on a man whom she did not even know to be now alive or dead.

Mr. Lupton stated at the interview on November 12 that he had taken counsel's opinion on behalf of the respondent, and that, under advice, no further information would be given.

Mr. Reilly, under advice, wrote on behalf of the petitioner the following letter:—

"Liverpool, February 12, 1907.

"Dear Sirs,

"*Re Mr. and Mrs. Getty.*

"Referring to our interviews with you and the correspondence which has passed between us, please inform us whether your client, Mrs. Getty, still declines to furnish us with the name and address of the man with whom she committed adultery.

"Yours truly,

"Toulmin, Lawrence & Shield.

"To Messrs. Nelson, Eddison & Lupton, Leeds."

To this a formal answer was returned saying that "Mrs. Getty declines to furnish you with further information than that which you already have at your command."

The petitioner's case having been closed, the learned judge intimated that he desired to see Mr. Charles Lupton in the witness-box.

Counsel for the petitioner said that they would call him if the Court was of opinion that they were entitled to examine him, having regard to the question of privilege.

Victor Russell, for the respondent. Although a formal answer has been placed upon the record to the effect that the respondent does not admit the allegation of adultery made in the petition, I am not in a position to put her in the box. She is not, in fact, here, and Mr. Lupton cannot, therefore, ask her whether she desires to claim privilege in regard to any evidence he may be asked to give.

Mr. Charles Lupton was then called on behalf of the petitioner, and said that he saw the respondent with reference to her written confession, a copy of which had been supplied to him by Mr. Reilly.

Question: Did she make any statement to you with reference to whether the confession she had made was a true one or not?

Witness: I object to answer. I have nothing to do with this suit.

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[BUCKNILL J. You must answer.]

Witness: I am not sure whether she did on that occasion, but she has made a communication since.

[BUCKNILL J. Tell me what was her real reason for refusing to give information as to the name of the co-respondent.]

Witness: I think out of regard for him and out of fear for the consequences that might ensue in regard to him, although she did not know whether he was alive or dead.

Cross-examined (by *Mr. Victor Russell*): Did Mrs. Getty ever tell you where the adultery took place?

Answer: Never.

BUCKNILL J. That seems to me very strong corroboration of the confession. If Mr. Charles Lupton had not been called, I should have found myself with only the confession of the respondent, written more than two years ago and not since repeated, unless as implied by her saying in effect that the money due to her by the terms of the marriage settlement was not any longer her money. If it had not been for the evidence of Mr. Charles Lupton, I should have felt very great difficulty in acting upon the respondent's confession; but, having heard his evidence, I am of opinion that all doubt of its genuineness and sincerity has been removed, and that the respondent so dealt with her solicitor as to shew that this was not an untrue confession, but that out of mercy towards, or through fear of the result to, the man, she was not going, to use a colloquial expression, to give him away. Having now, as I say, sufficient evidence before me to remove from my mind all reasonable ground for suspicion, I am satisfied that the wife's confession was true, having been confirmed long afterwards to her own solicitor, when she told him in effect that the adultery was committed shortly after she arrived in England, that it was not continued, but that out of fear for the consequences to the man she did not wish to disclose his name.

I therefore pronounce a decree nisi.

Solicitors for petitioner: *Norris, Allens & Chapman, for Toulmin, Lawrence & Shield, Liverpool.*

Solicitors for respondent: *T. B. & W. Nelson, for Nelson, Eddison & Lupton, Leeds.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1907
March 18.

THE MANOR.

Admiralty—Ship—Mortgage—Possession—Imperilling Security of Mortgagee.

If the dealings with a ship by the mortgagor are of such a character as to be inconsistent with the sufficiency of the security, the mortgagee may take possession, although there has not been any actual default on the part of the mortgagor under the mortgage, and although the mortgagee has not commenced any formal proceedings.

Appeal by defendants, the Dowgate Steamship Company, Limited, mortgagees of the steamship *Manor*, against a decision of Bargrave Deane J. pronouncing that vessel to be the sole property of the plaintiffs, the Manor Steamship Company, Limited, and pronouncing that the plaintiffs were, on June 18, 1906, entitled to possession of the vessel, and referring the question of general and special damages to the registrar assisted by merchants to report thereon, and ordering that the freight held by the defendants be forthwith paid into Court, and condemning the defendants in the costs of the action.

The case raised the question as to the nature of the circumstances which will justify the mortgagee of a ship in enforcing his security by taking possession.

On June 18, 1906, the plaintiffs, the Manor Steamship Company, Limited, issued a writ against the defendants, the Dowgate Steamship Company, Limited, claiming, as sole owners of the *Manor*, a decree of possession of the ship, a declaration that the defendants were not entitled to take possession of her as mortgagees, or of any freight earned by her, and further or other relief.

By their statement of claim delivered on June 23, the plaintiffs alleged that they were the registered owners of sixty-four sixty-fourth shares in the British steamship *Manor*, and that the defendants were the registered mortgagees of the said shares, and that:—

2. By an agreement in writing, dated May 16, 1904, and made between the defendants and Mark Snell Catt, the defendants agreed to sell the steamship *Dowgate*, afterwards named the

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Manor, for the sum of 17,000*l.*, which Mr. Catt agreed to pay as follows:—4000*l.* in cash on delivery of the ship, 3000*l.* by acceptances to be secured by the transfer to the defendants of shares in a company to be formed for the purpose of acquiring the said ship, and 10,000*l.* by five instalments of 2000*l.*, payable as to the first instalment twenty-four months after the date of delivery of the ship, and to be secured by a first mortgage of the ship.

3. In pursuance of the said agreement the plaintiff company was formed to acquire the said ship, and was duly registered on June 7, 1904, and Mr. Catt was made manager.

4. On June 29, 1904, the defendants delivered the said ship to the plaintiff company, and transferred her by a bill of sale to the plaintiffs for sixty-four sixty-fourth shares. The bill of sale was duly registered in the name of the plaintiff company, and Mr. Catt was registered to act as manager of the said ship.

5. The defendants were duly paid 4000*l.* in cash on delivery of the ship as aforesaid. Mr. Catt drew acceptances for sums amounting to 3000*l.*, and the balance of the purchase-money, amounting to 10,000*l.*, was secured by a first mortgage for sixty-four sixty-fourth shares in the said ship, executed by the plaintiff company on June 29, 1904, and duly registered in the name of the defendant company.

6. By an agreement in writing dated July 11, 1904, and made between the plaintiffs and the defendants, the defendants agreed to accept six hundred 5*l.* shares in the plaintiff company in full payment and satisfaction of the said sum of 3000*l.* which formed part of the purchase-money as aforesaid, and in lieu of Mr. Catt's acceptances for such sum. In pursuance of such agreement the plaintiff company allotted, and duly transferred six hundred 5*l.* fully paid-up shares to the defendants. The plaintiffs were thereby discharged from all liability in respect of the said portion of the purchase-money payable as aforesaid for the said ship, and in respect of the balance of the purchase-money, amounting to 10,000*l.*, and secured by the said mortgage, are not liable to pay the first instalment thereof of 2000*l.* before June 30, 1906.

7. On May 1, 1906, Mr. Catt, duly acting in pursuance of his

powers and authority as manager of the plaintiff company and the said ship, chartered her to Mr. G. Tonnelier, of Antwerp, to load on or before June 30, 1906, a full cargo of rails and fittings for carriage to Mexico, and on May 16, 1906, chartered her to Messrs. Haines & Son, of London, to load on or before October 18, 1906, a full cargo of lumber for carriage to Callao.

8. On June 13, 1906, the said ship arrived at Cardiff to discharge a cargo of wheat in bags, consigned from South Australia to Spillers & Bakers, Limited, of Cardiff, and on her arrival the defendants, although the first instalment of the sum secured by the mortgage was not yet due, wrongfully and improperly took possession of the ship, and have refused, and still refuse, to give possession to the plaintiffs although requested to do so, and in particular for the purpose of enabling the plaintiffs to discharge the cargo promptly, and to prepare and equip the ship for carrying out her engagements.

9. The defendants have also wrongfully and improperly dismissed the master of the said ship, and put the mate in charge as master.

10. The defendants have wrongfully and improperly taken possession of the freight, amounting to about 2640*l.*, due on delivery of the said cargo, or given notice to Spillers & Bakers, Limited, to hold the same on their behalf and not pay it to the plaintiffs or the master.

11. The defendants have also wrongfully and improperly given notice to the charterers, referred to in paragraph 7, or their agents repudiating the said charterparties, and inviting them to cancel the said charterparties, and the defendants have thereby infringed the contractual rights of the plaintiffs, and slandered their title to the said ship, and the authority of their manager, and have thereby injured the business reputation of the plaintiffs and impaired their credit.

12. By reason of the aforesaid matters the plaintiffs have suffered and are still suffering loss and damage, and are being prevented from performing the said charterparties and earning freight thereunder, and are being threatened with or exposed to claims by the said charterers for damages for breach of the said charterparties and by the master for wrongful dismissal.

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By their defence, delivered June 27, 1906, the defendants admitted the allegations in paragraphs 3, 4 and 5 of the statement of claim, and admitted that they entered into the agreements referred to in paragraphs 2 and 6 respectively of the statement of claim, but denied that their effect was correctly set forth, and alleged that:—

3. The agreement dated July 11, 1904, referred to in paragraph 6 of the statement of claim must be read together with an agreement in writing of the same date made between the defendants and Mark Snell Catt, who in entering into the said agreement was acting on behalf of the plaintiff company. The effect of the said two agreements when read together according to their true intent and meaning was that the defendants should accept from the said Mark Snell Catt six hundred 5*l.* shares in the plaintiff company as collateral security for the due honouring by the plaintiff company or by the said Mark Snell Catt on their behalf of acceptances amounting to 3000*l.* which were held by the defendant company in respect of part of the purchase-money of the said steamship as the same became due. From time to time the plaintiff company or the said Mark Snell Catt on their behalf made payments in respect of amounts due under such acceptances to the defendants, who thereupon re-transferred a proportionate amount of the said shares to the said Mark Snell Catt. One acceptance for 500*l.* forming part of the purchase-money of the said steamship fell due on January 1, 1906, but was dishonoured on presentation, and has not since been paid. The plaintiff company thereby made default in payment of one of the instalments of the purchase-money, whereupon the whole amount immediately became due under the agreement of May 16, 1904, and the defendants thereupon were at liberty to re-sell the vessel.

4. Under the said agreement of May 16, 1904, it was (inter alia) provided that 10,000*l.*, part of the unpaid purchase-money, should be secured by an assignment of good and approved policies of insurance upon the said vessel. It was an implied term of the said agreement that the plaintiff company should keep the said vessel insured by good and approved policies of insurance for the benefit of the defendants. The plaintiffs

effected insurances upon the said steamship but neglected to pay the premiums, and the defendants, in order to preserve their security, were compelled to pay, and did pay, the sum of 252*l.* 4*s.* 11*d.* to the insurance brokers in respect of such premiums. The plaintiffs have failed to repay the said sum to the defendants.

5. The plaintiffs failed to provide the requisite funds to meet the necessary disbursements of the said ship while trading between the months of June, 1904, and May, 1906, and heavy liabilities have been incurred during such period for disbursements and wages in respect of which maritime liens have been created which have seriously impaired the value of the defendants' security and imposed a great and undue restriction upon the defendants' power of sale. The said steamship is out of repair and requires a considerable sum to be spent upon her, for which the plaintiffs have no funds available, and the plaintiffs are without the necessary funds to work her.

6. The defendants admit that Mr. Catt entered into the charterparties referred to in paragraph 7 of the statement of claim; but say that the same were not proper or profitable charterparties, but were of an improvident character entered into solely with the object of securing the freight, which was largely payable in advance. If the said steamship is allowed to carry out the said charterparties for the plaintiffs, the plaintiffs will be unable to provide her with the necessary funds, and she will be obliged to procure money to pay her way by creating maritime liens which will exhaust the value of the vessel and entirely deprive the defendants of their security as well as place an undue restriction upon the defendants' power of sale.

7. By reason of the matters hereinbefore set forth, the defendants contend that they were entitled to take possession of the said steamship, which they did by notice in writing to the plaintiffs dated May 14, 1906, and by taking actual possession of the vessel on her arrival at Cardiff on or about June 13, 1906.

8. The defendants admit that they have dismissed the master of the said ship, that they have given notice to Spillers & Bakers, Limited, to hold the freight due on delivery of the cargo lately on board the said steamship on their behalf, and that they have

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given notice to the charterers referred to in paragraph 7 of the statement of claim repudiating the said charterparties; but they deny that the said acts were wrongful or improper as alleged in paragraphs 9, 10 and 11 of the statement of claim or at all.

The defendants further alleged that the charterparty of May 1, 1906, gave to the charterers the option of cancelling the charterparty if the ship did not arrive at Bilbao by June 30, 1906, and that the steamship was, on her arrival at Cardiff on June 13, 1906, arrested for certain maritime liens which the plaintiffs were not able to discharge, and if the plaintiffs had been able to discharge these liens the vessel could not have discharged her cargo and effected certain necessary repairs to her deck and other parts in time to admit of her reaching Bilbao so as to save the cancelling date.

At the hearing of the action on June 28 and July 2, 1906, the manager of the Manor Steamship Company, Limited (M. S. Catt), and the managing director of the Dowgate Steamship Company, Limited (H. W. Dillon), were called on behalf of the plaintiffs and defendants respectively, and bore out generally the allegations of fact in the statement of claim and in the defence.

An agreement, dated December 14, 1904, between the Manor Steamship Company, M. S. Catt and James Smith, whereby, on depositing 500*l.* with the company by way of loan, the last-mentioned was appointed master of the *Manor*, was put in; also the agreement dated May 16, 1904, referred to in paragraph 2 of the statement of claim, the mortgage executed on June 29, 1904, the agreement dated July 11, 1904, referred to in paragraph 6 of the statement of claim, and paragraph 3 of the defence. Amongst the correspondence between the parties as to taking possession, and as to notices by the defendant company to charterers, the following letters were referred to in the judgments:—

A letter, dated May 14, 1906, from the defendants' solicitors to M. S. Catt:—

"On behalf of the Dowgate Steamship Company, Limited (the mortgagees of the above vessel), we beg to give you notice that you have committed a breach of your agreements with them by

reason of the non-payment of the ship's debts, the non-payment of the premium of insurance to keep policies on foot and otherwise by the non-observance of the terms of the agreements entered into by you on behalf of your company.

"Under the above circumstances we now give you further notice that you must not again charter the said steamship, but must from this date consider our clients, the Dowgate Steamship Company, Limited, as mortgagees in possession of the *Manor* steamship, and they require you to bring her forthwith to a home port that they may be in a position to enforce their security and to see that the ship's debts are paid, and should you in defiance of this notice attempt to charter the steamer you must understand our clients will not be bound thereby, and you and your company will alone be responsible for any damages that may arise in consequence.

"We hold the Durban drafts on behalf of our clients, Messrs. John T. Rennie, Son & Co., on which there is a balance owing of 786*l.* 18*s.* 3*d.*, and which our clients, the Dowgate Steamship Company, Limited, will now have to pay; they have also been called upon to pay premiums of insurance amounting to 252*l.* 3*s.* 5*d.*

"Under these circumstances, our clients have felt bound to instruct us to give you the notices contained in this letter, and be so good as to understand that you must not after receipt of this letter act in any way at variance with our clients' instructions."

A letter, dated May 18, 1906, from H. W. Dillon to M. S. Catt:—

"I thank you for the papers you have sent up, in connection with the *Manor*, which I am looking into.

"Referring to our conversation in this office this morning, in which you stated you had not been able to get any of the Port Said coaling people to pay the canal dues on the *Manor*, and that you were not able to find this money yourself, I, acting on behalf of the Dowgate Company, the mortgagees, have arranged that Messrs. Moxey, Savon & Co. will instruct their agents at Port Said to pay the canal dues and supply the vessel with coals, drawing upon your company for the money, in consideration of

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the Dowgate Company guaranteeing the due payment of the draft.

"I have therefore given this undertaking in order that the ship may be able to proceed on her voyage and avoid expense and loss in delay, and possibly a claim by receivers of the cargo for wrongful detention. I have also telegraphed the captain that the Dowgate Company have entered into possession as mortgagees, and generally in accordance with the letter which Messrs. Ince, Colt & Ince wrote you on behalf of the Dowgate Company a few days since."

A letter, dated May 28, 1906, from the defendants' solicitors to Heatley & Co., charterers:—

"SS. *Manor*.

"We beg to inform you that the Dowgate Steamship Company, Limited, are the mortgagees of the above steamship and, as such, have taken possession of the steamer, and since they have done so we are advised that Mr. Catt has chartered the ship to you.

"Under these circumstances, we beg to give you notice that Mr. Catt, the manager of the company, had no power to enter into the charter after our client's notice, and that our client, the mortgagees in possession, will not be bound by the charter."

The effect of the evidence, the details as to the various substituted agreements, and the arguments of counsel sufficiently appear from the following judgment:—

1906, Aug. 11. BARGRAVE DEANE J. This is an action brought by the Manor Steamship Company, Limited, to recover possession of the steamship *Manor* from the Dowgate Steamship Company, Limited, who took possession of that vessel on June 14, 1906.

The history of the case is shortly this: Mr. Mark Snell Catt entered into an agreement with the Dowgate Steamship Company to buy of them the steamship *Dowgate*, the property of the Dowgate Steamship Company, for a sum of 17,000*l*., and that agreement is dated May 16, 1904. The purchase-money was to be paid by 4000*l*. in cash in London against the delivery of the steamer, and as to a further sum of 3000*l*. by four acceptances—500*l*. by an

acceptance at three months' date from the date of delivery, 500*l.* at six months, 1000*l.* at twelve months, and 1000*l.* at eighteen months; the balance of the 17,000*l.*, namely a sum of 10,000*l.*, was to be secured by mortgage—the moneys to be paid in the following manner: 2000*l.* twenty-four months after date of delivery; 2000*l.* thirty months after date of delivery; 2000*l.* thirty-six months after date of delivery; 2000*l.* forty months after date of delivery; and 2000*l.* forty-six months after date of delivery. That is the original agreement. That portion of the purchase-money, the 10,000*l.*, was to be secured by a first mortgage bearing interest at the rate of 5 per cent., and an assignment of good and approved policies of insurance. That being the agreement, it was made between Mr. Dillon, the managing director of the Dowgate Steamship Company, and Mr. Mark Snell Catt personally.

That agreement was subsequently varied. On June 7, 1904—I am taking these in order of date—the Manor Steamship Company (the plaintiff company) was formed with a capital of 8000*l.* The amount of the capital was within the knowledge of the defendant company, and also that Mr. Catt was appointed manager of the Manor Steamship Company, and the Manor Steamship Company re-named the vessel when she was delivered to them later the *Manor*. And it is with reference to that particular vessel that this action is brought.

On June 29 the steamer was delivered to Mr. Catt. 4000*l.* was paid in cash; but at the same time a new agreement was entered into by which it was agreed that with regard to the 3000*l.*, a part of the purchase-money, the defendant company should receive six hundred 5*l.* shares, representing 3000*l.*, in part payment, and those shares were to be redeemed by Mr. Catt personally.

On July 11 the Dowgate Steamship Company and Mr. Catt agreed in writing that instead of the 3000*l.* being paid in that form six hundred 5*l.* shares should be given in that steamship to the defendant company, and this recites that: "In consideration of the Dowgate Steamship Company, Limited, having at the request of the said Mark Snell Catt consented to a modification of the terms of purchase of the *Dowgate* steamship as more

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fully set forth in the principal agreement, the said Mark Snell Catt hereby agrees with the Dowgate Steamship Company, Limited, that he will purchase, or procure to be purchased at par from the Dowgate Steamship Company, Limited, the six hundred shares in the Manor Steamship Company, Limited, which have been issued to the Dowgate Steamship Company, Limited, in pursuance of the principal agreement, and are numbered 526 to 1125, and that such purchase shall be effected in manner and at the times following, that is to say, one hundred of such shares shall be purchased not later than three months from June 30, 1904; one hundred not less than six months from the same date; two hundred not less than twelve months from the same date; and two hundred not less than eighteen months from the same date." Therefore the shares were covenanted by Mr. Catt to be redeemed by himself personally at the price which I have mentioned; and it was agreed further that as these payments were made shares to the value of the payments should be transferred by the Dowgate Steamship Company to Mr. Catt.

The first question of law arises here. It is said that that agreement was made by Mr. Catt as representing the company. That could not be so in law. A company could not covenant to buy back shares. It has been so decided. A company has capital, and that capital has to be invested in certain shares, and when once those shares have been completely dealt with, it cannot out of other moneys buy back, or buy from any other person shares in its own company. The company cannot be a purchaser of shares, and therefore this is an agreement I hold strictly between the Dowgate Steamship Company and Mr. Catt.

On the same date as that agreement which I have just read, an agreement was also made between the Manor Company and the Dowgate Steamship Company, and a mortgage was entered into. The mortgage I have here. It recites that "The Manor Steamship Company, Limited, having its registered office 113, Fenchurch Street, is indebted to the Dowgate Steamship Company, Limited, whose registered office is situate at Ethelburga House, Bishopsgate Street Within (hereinafter called the Dowgate Company), in the sum of 10,000*l.* to be paid at the

times, and with the interest, and under the conditions set out in an agreement bearing date the 16th day of May, 1904 "—that is the agreement with Mr. Catt, and therefore at that time the Manor Steamship Company had accepted the agreement made by Mr. Catt so far as the agreement for the purchase of that vessel was concerned.—" And by the said agreement it was (inter alia) provided that the due payment of the said sum of 10,000*l.* and interest, and any further sums which may become due to the Dowgate Company on account current should be secured by a first mortgage of the ship, as described," and then the operative part follows in the usual form.

That was the state of things on July 11, 1904, and the ship thereupon became the property, or rather was at this time the property, of the Manor Steamship Company, subject to a first mortgage to the Dowgate Steamship Company for the payment of 10,000*l.*, as agreed in the original agreement, that is to say, at the times and in the proportions set out in the original agreement, and also to cover any other sums due on account current.

The vessel was thereupon insured by the Manor Company with Messrs. Head & Co., insurance brokers, and there is no complaint made as to the payment of the premiums for the first year. For the second year, 1905–6, the ship was duly insured. I have the policy here up to, I think, July 31 or June 30. I may be wrong about the exact date—a date subsequent to the material date in this matter, upon which the defendant company took possession. But it is said that, although she was insured, Mr. Catt, as manager of the Manor Steamship Company, did not pay the whole of the amounts to Messrs. Head, the insurance brokers, representing the premiums. The premiums were agreed to be paid by Mr. Catt to the insurance brokers, who had insured the vessel, so that she was insured by two monthly payments. It was 252*l.*, I think some odd shillings, every two months, and he paid to Messrs. Head all the amounts due except the last two months of May and June. Apparently he gave his personal guarantee to pay to Messrs. Head, but he did not pay.

I have to ask myself whether the ship was insured, and I think if the ship had been lost that there cannot be the smallest

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doubt that the insurance company would have had to pay the total insurance value, that is to say, they would be liable to pay whatever insurance was necessary. I think the ship was covered by insurance. There may have been a right of action by Messrs. Head & Co. against Mr. Catt for premiums which, though not paid, were due, but I do not think that affects the question of whether the ship was in fact insured.

The vessel apparently went on a long voyage. She was away for twenty months, but during that time she appears to have got into debt, and when she was on her way home and was approaching the Suez Canal she had to pay in advance the dues for passing through the canal. Mr. Catt, at the time, as representing the company, was unable to find those dues. Mr. Catt also was unable to get bunkers to bring the vessel home from there, and he seems to have gone at once to Mr. Dillon, representing the Dowgate Steamship Company, and at his request Mr. Dillon provided for the dues of the Suez Canal and also provided for the bunkers to bring the vessel home. That opened an account current, and as far as I can see up to that time, there had been no account current, between Mr. Dillon and the Manor Steamship Company or Mr. Catt; but at that time, undoubtedly, there was this account current open. The vessel arrived at Cardiff with a cargo of wheat on June 13, 1906. I have left out a date which I ought to refer to before I go any further. When the vessel was at Suez Mr. Dillon communicated with the captain, Smith, that he was taking possession of the vessel as mortgagee. When the vessel arrived at Cardiff, Mr. Dillon went down there for the purpose of formally taking possession, but he found that the captain had already issued a writ, which was on the vessel, for necessaries and disbursements which he had supplied, and for money due to him as master of the ship. Mr. Dillon seems to have taken a course which he thought he was justified in taking. He dismissed the master; he paid off the crew; he got rid of the captain's writ, and on June 14 he himself took possession of the ship formally, and that is the possession which the plaintiffs seek to have removed.

It does not appear that up to that time Mr. Dillon had made any request to the Manor Steamship Company for repayment

of any of the amounts due to him on account current. It does not appear that apart from that there was any money really due from the Manor Steamship Company to the Dowgate Steamship Company.

Counsel for the defendants have said, and one of their points is, that there was a sum of 500*l.* due from the Manor Steamship Company to the Dowgate Steamship Company. That sum of 500*l.* is the last instalment for the repurchase of the shares, and I do not think it is disputed that with regard to that agreement for the purchase of the shares Mr. Catt's story is accurate. The first 500*l.* in redemption of the shares, which, as I have already pointed out, was an agreement between the Dowgate Steamship Company and Mr. Catt, and not between the Dowgate Steamship Company and the Manor Steamship Company, was payable at three months after June 30, the next at six months, and the next at twelve months, so that in all the sum of 2000*l.* had become due and had been paid by Mr. Catt, and the shares had been transferred to him personally, and he was the holder of those shares in the company, and not the company the holders themselves; but in the beginning of April a further sum of 1000*l.* became due, and therefore shares had to be transferred from the Dowgate Steamship Company to Mr. Catt, and that would have concluded the whole business of the six hundred shares which had to be redeemed. Mr. Catt has told us that he was unable to redeem the whole at that time. I think he said he had 500*l.*, but there was a further sum of 500*l.* not found by him, and therefore there was a default by him in payment of the amount due of that, the last instalment, and there was no possibility of his obtaining the whole of the shares back. He has said, and I do not think it has been disputed, though I cannot find anything in the documents about it, that, instead of six hundred shares having been handed over to the Dowgate Steamship Company, seven hundred shares were handed over, leaving a margin in favour of the Dowgate Steamship Company over and above the amount secured. Mr. Catt says that at that time, although he paid the 500*l.* and redeemed shares to that amount, that would be one hundred shares out of two hundred; he did not get those shares back, but he left them with the Dowgate Steamship

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Company, so that there would be a sort of cross account. He was entitled to the one hundred shares for the 500*l.*, which he did take, but the balance of 500*l.* he did not pay, and therefore, so far, there was a breach. I do not think, and I do not find—I have already stated it — that that was a debt due from the Manor Steamship Company. It was a personal covenant between Mr. Catt and the Dowgate Steamship Company, and it was a personal liability by Mr. Catt, and not a liability by the Manor Steamship Company; therefore I think counsel for the defendants have not established their point that there was a sum of 500*l.* due at that time from the Manor Steamship Company to the Dowgate Steamship Company.

That is one of the first matters which I find in this case; and with regard to the right of possession, in my opinion there was no default so far as the Manor Steamship Company was concerned as to that 500*l.*

The next point the defendants rely upon is as to the insurance of the vessel. I have already dealt with that. I have found that in fact this vessel was insured, that the property of the mortgagees was not in danger in that respect. As I have said, the vessel was safe, so far as insurance was concerned, although the insurance brokers would have had to sue Mr. Catt himself for the balance of premiums due on his personal guarantee.

The result is that there was nothing due to the Dowgate Steamship Company from the Manor Steamship Company, unless it can be said there was something due under the mortgage. That is to say, there had been no default made by the Manor Steamship Company in respect of any agreement.

But then there comes the question of the mortgage. The mortgage was to secure payment of 10,000*l.*, to be paid in instalments; the first instalment did not become due until twenty-four months after the date of delivery, that would be June 30, 1906; and therefore, on June 14, when Mr. Dillon took possession of this ship, there was nothing due in that respect under the mortgage. Was there anything due on account current? And that is the real difficulty I have had in the case. As I have said, at the end of May or the beginning of June there was this difficulty about getting the ship home through the Suez Canal, and getting

bunkers for her, and, undoubtedly, at that time, Mr. Catt, representing the Manor Steamship Company, induced Mr. Dillon, representing the Dowgate Steamship Company, to find money, or to guarantee the payment of money—to find money, I take it—for the canal dues, and also to guarantee the payment of money for the bunkers. Therefore, as I have said, the account current was open, but the vessel was taken possession of before there was a possibility, as far as I can see, of the company making default if it had been required to make payment on the account current.

Several cases have been quoted to shew that, where the payment was made by a mortgagee to clear a debt, that debt was at once enforceable without demand. I do not think that is this case. I think that is a special matter which Mr. Dillon ought to have brought before Mr. Catt before he took possession, and the act of Mr. Dillon in taking possession of this vessel on June 14, before he communicated with Mr. Catt in the matter at all, was premature. In my opinion, therefore, he had no right to take possession of this vessel at the time when he did.

That is the whole of the question really raised on the pleadings. There is no claim on the part of the defendant company. I have only got to say whether or not, in my opinion, Mr. Dillon was justified in taking possession on June 14, and, for the reasons I have stated, I do not think he was. I am not asked to find anything about the defendant company. Therefore, as far as that is concerned, the case is at an end, and I so find.

Many matters have been brought before the Court. It is said that Mr. Dillon was justified in taking possession of the vessel to stop the vessel going on future voyages under charters which had been made by Mr. Catt on behalf of the Manor Steamship Company. I have heard what Mr. Catt has had to say, and he says that all the voyages which he chartered for would have been of a remunerative character.

Mr. Dillon, on the other hand, says that, in his opinion, they would not have been remunerative, and that, on the contrary, they would have been dangerous and detrimental. I cannot decide this question—it is impossible. I have got one man saying one thing, and another saying the other. I cannot

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possibly say which is right; I have nothing to guide me. There is no evidence at all which would justify me in saying one way or the other. If I were satisfied that this vessel had been chartered to go on undoubtedly bad voyages, voyages which would clearly injure the property of the mortgagees, then undoubtedly there are cases which would justify me in saying that I think Mr. Dillon was right in preventing the vessel going on those voyages, and that he was right in preventing the charters being carried out. But I do not find so in this case. I cannot find so. Therefore I do not think I ought to say that Mr. Dillon was justified in putting an end to and preventing the vessel from fulfilling those charters. The action he took undoubtedly did prevent the vessel, and has prevented the vessel up till now, from doing anything in respect of those charters. Now what am I to do? I can only say that possession should be given up, and I must direct an inquiry before the Registrar and merchants as to damages, to see what the real condition of things is. I am unable to say anything about it myself. For these reasons, I think judgment should be entered for the plaintiff company, with a declaration that they were entitled to possession at the date of the writ, an inquiry as to general and special damages, and an order for payment of the freight into court.

On appeal:—

1907. March 18. *Laing, K.C.*, and *H. C. S. Dumas*, for the appellants (defendants). It is submitted that the learned judge in the court below was wrong in holding that there was no default on the part of the respondents, the mortgagors, for the acceptance for 500*l.* had been dishonoured on presentation; that is to say, there had been an actual breach of the agreement with regard to the payment of one instalment, as stated in paragraph 3 of the defence, and the appellants had paid the premiums of insurance in order to protect their security; but, apart from any question of default, and assuming, for the purposes of argument, that there was no actual default, still the appellants, as mortgagees, were entitled to take possession

because their security was being imperilled by the mode in which the vessel was being dealt with, as appears from the evidence adduced in the court below in support of paragraphs 5 and 6 of the defence. This point was not sufficiently considered by the learned judge, who only says in his judgment that he did not think Mr. Dillon was justified in putting an end to, and preventing the vessel from fulfilling, the charters. Since this judgment was delivered, the President has had before him an action by the present appellants, as plaintiffs, seeking to enforce the mortgage on the ground of default, and that learned judge has found that on June 29 or 30 there was default.

[*Dunlop*, for the respondents. The finding of the President in another action is not material for the purposes of the present appeal.

LORD ALVERSTONE C.J. The judgment may be referred to.]

The President could not deal with the case prior to June 18, owing to the judgment of Bargrave Deane J., now under appeal; but incidentally the learned judge refers to the question of the security being imperilled, and finds that the action of the present respondents, the mortgagors, was impairing the security of the mortgagees. (1) With reference to these dealings by the mortgagors with the ship, it is not disputed by the appellants that—in accordance with the authorities set out in the judgment of Sir F. H. Jeune in *The Heather Bell* (2), including the dicta of Lord Westbury in *Collins* v. *Lamport* (3)—the mortgagor has authority to act as owner, and has, therefore, "authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property"; and s. 34 of the Merchant Shipping Act, 1894, leaves the mortgagor with the powers of an ordinary owner; but the contracts he enters into must not impair the security, and, in this case, the mortgagors were in default, and were about to send the vessel off on a long voyage without being able to provide her with the necessary funds, so that they would be obliged to rely upon the maritime lien of the master to procure

(1) See note, p. 363, post. (2) [1901] P. 143, at p. 149.
(3) (1864) 34 L. J. (Ch.) 196.

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money to pay her way, with the result that the value of the vessel would be exhausted, and the appellants deprived of their security. This distinguishes the case from *The Blanche* (1), where Butt J. said that if he "saw any attempt to impair the security, so that it would not be available," he would say that the mortgagees were justified in taking possession. In the case of *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade* (2) the ship had actually sailed with her cargo on the voyage under the charterparty, when the mortgagees obtained a declaration that the charterparty was not binding on them on the ground that the nature of the charter impaired the security.

[They were stopped by the Court.]

C. R. Dunlop (*Aspinall, K.C.*, with him), for the respondents (plaintiffs). The appellants, the mortgagees, were not entitled to take possession when they did. The cause of action relied on was default under the mortgage, but in the court below it has been found as a fact that there had been no default, and also that the ship was covered by insurance, so that both those points failed, and the question of an account current was also disposed of by the learned judge. With regard to the nature of the proposed charters, and the allegation that the security of the mortgagees was being impaired, the evidence of Mr. Catt is before the Court that the charters were of a remunerative character, and the learned judge declined to find that Mr. Dillon was right in preventing the charters being carried out, in other words, paragraphs 3 to 6 of the defence were not substantiated. The ship being in a home port no maritime liens for necessaries would be created, and the only maritime lien existing was that in respect of the crew's wages, amounting to 1040*l.*, and the master's wages, amounting to 300*l.* Against this there was 2600*l.* due on charter. The two sums would, but for the action of the mortgagees, have been paid out of this freight, which was not under arrest in any action at that time, and would therefore have come to the hands of the owners in due course but for the notice given by the mortgagees to the consignees. This would have left a balance in hand to meet

(1) (1887) 6 Asp. M. L. C. 272.

(2) [1905] 1 K. B. 815.

the instalment when it fell due under the mortgage. The bill for the canal dues would not mature till July, and that and any further liability would have been amply covered by the freight payable in advance under the charterparties entered into by Mr. Catt, had not the mortgagees stepped in and, by notice of cancellation, prevented the vessel being profitably employed.

[FLETCHER MOULTON L.J. The real question is whether the mortgagees' security would be materially impaired if the ship were left under the control of the mortgagors.]

The suggestion is that the security would be imperilled by the master paying for coals and other necessaries abroad, and protecting himself by means of his lien on the ship against his liability on the bills when presented; but the evidence that the owners were going to employ the ship in the ordinary way negatives this suggestion, and the learned judge in the court below was not satisfied that any injury to the property of the mortgagees would result from carrying out the charters. The authorities also shew that though a vessel may become subject to a maritime lien that is not sufficient to justify a mortgagee enforcing his security by taking possession, for, as remarked by Sir Gorell Barnes in *The Ripon City* (1), "it is every-day practice for the interests of mortgagees in vessels to be subjected to maritime liens for damage and other claims." The risk of such liens attaching is incidental to the ordinary employment of a ship, and, though the mortgagee's security is in fact reduced if they do attach, he is not entitled to prevent the ship from proceeding on her voyage in order to save her from the chance of becoming subject to such liens. To hold otherwise would be to deprive a mortgagor of those rights of ownership of which the mortgage does not, and was never intended to, divest him. In any view of the facts the mortgagees were not justified in adopting such a drastic measure as taking possession; but, if they felt themselves aggrieved, they should have commenced formal proceedings to enforce their security.

LORD ALVERSTONE C.J. In my opinion this case is not covered by any distinct authority, but it belongs to the class of case

(1) [1897] P. 226, at p. 243.

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mentioned in argument both in *The Heather Bell* (1) and in a case which came up to this Court by way of appeal from Channell J.—*Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade* (2)—in which case he had decided that certain charterparties had imperilled the security. In other words, this case is an illustration of a set of circumstances which may give rise to that state of things which has been often commented upon, and which is described by Lord Westbury in *Collins* v. *Lamport* (3) thus: "As long, therefore, as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from, or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner, he has, of necessity, authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." And the Lord Chancellor, on a later occasion, said: "His contracts with regard to the ship will be valid and effectual, provided that his dealings do not materially impair the security of the mortgagee." That dictum was distinctly recognized by the House of Lords in *Keith* v. *Burrows* (4), as I ventured to point out when I was giving judgment in *The Heather Bell.* (1)

It seems to me that we have to decide the question whether or not Bargrave Deane J. was right in coming to the conclusion that on the facts there was not sufficient impairing of the security to justify the mortgagee in taking possession on either June 14 or 18. The learned judge has said that if he was satisfied that the vessel had been going on a bad voyage, then Mr. Dillon was right in preventing the vessel going on that voyage. It may be that the real question in this case was not as strictly brought before the learned judge as it has been brought before us, although counsel on both sides admit that the point was distinctly raised. There was the question whether there was a

(1) [1901] P. 143; on appeal, 272.
(2) [1905] 1 K. B. 815.
(3) 34 L. J. (Ch.) 196, at p. 200.
(4) (1877) 2 App. Cas. 636, at p. 645.

breach of the agreement, which counsel for the appellants now say they abandon; there was the question of insurance, as to which, speaking for myself, I should have been in accord with Bargrave Deane J.; and there was this further question which has been the main point raised before us, that under the circumstances which were existing at the time the mortgagee took possession his security was being impaired.

In our view there is only one question in the case, viz., what are the rights of the mortgagee if he finds the vessel is going to be sailed on charterparties by an impecunious mortgagor and on credit. It may be that that circumstance, taken by itself—although I think that the opinion expressed by Bargrave Deane J. is extremely good common sense—would require further consideration; but when we look at the broad facts of the case as they existed when this vessel came to Cardiff, I think it would be straining the rights of the mortgagor to excess if we were to hold that he was entitled to keep the management and chartering of this vessel in defiance of the rights of the mortgagee and prevent the mortgagee from taking possession.

I do not hesitate to say that, although I came to a contrary conclusion in *The Heather Bell* (1), and my attention having been drawn to the view which the learned judges, Dr. Lushington and Butt J., had taken, we held that the circumstances did not bring the case within the rule that the security was impaired, or, in other words, that the principle laid down in *Collins* v. *Lamport* (2) in favour of the mortgagee did not apply, I unhesitatingly come to the conclusion that, in this case, a set of circumstances did exist which did in fact impair the security.

As I have already said, there had been a breach of contract in the matter of insurance, though I should not think that sufficient by itself, because, for some reason or other, the mortgagees have thought it wise to step into the breach, and to pay the 250*l.* to protect the insurance; but it must not be overlooked that those insurances only lasted till some early date in July, and have nothing to do with the insurance of the vessel when she left Cardiff, all which would have to be dealt with by future proceedings. What, however, is now proved is, that there was

(1) [1901] P. 272, at p. 279. (2) 34 L. J. (Ch.) 196.

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due on the previous venture upwards of 4000*l.*, viz.: to the crew 1044*l.*, to the master 300*l.*, canal dues 988*l.*, coals 338*l.*, 771*l.*, and 572*l.*, and there were considerable sums which were required to be paid for the repairing of the ship, and paying the dues on her, and victualling, so that she would be able to go on her future voyage. As to part of that the mortgagee has already had to put his hand into his pocket. Again, the letter of May 14 shews that he would have to pay the 786*l.* to Messrs. Rennie & Co., for his solicitors say so, and he had been called upon to pay 252*l.* Thus, on May 18, Mr. Dillon writes to Mr. Catt, that, acting on behalf of the mortgagees, he had arranged for the payment of the canal dues, and supplying the vessel with coals, and adds that he had telegraphed to the master that the Dowgate Company had "entered into possession as mortgagees." I have very little doubt that at that time it was to the interest of Mr. Catt that Mr. Dillon should assume the position of being mortgagee in possession, as he was getting the money from Mr. Dillon, and, on May 28, there was a further notice to charterers that the Dowgate Steamship Company had taken possession.

Under these circumstances it is suggested that the outside liability did not exceed 2600*l.*; but, on arrival at Cardiff, there was 4000*l.* which could be enforced against the ship through the master's liability for bills, which would come before the rights of the mortgagee. Speaking for myself, I do not think that in such a matter the Court would wholly disregard the fact that the mortgagee knew that Mr. Catt was in insolvent circumstances, and that within a fortnight 2000*l.* was to become due under the mortgage, in respect of which amount possession has been given to the mortgagees under a subsequent judgment of the President.

I think, therefore, that the dealing with this ship by the mortgagor, in the state of circumstances which existed when she arrived in the port of Cardiff, was such that, if the ship was left in the possession of the mortgagor, the security of the mortgagee would have been seriously impaired; and whether you apply the test put by the President when he was discussing the matter in the later case, or whether you look at the position of a ship in respect of which there are pressing liabilities and charges such as

those to which our attention has been directed, we should not do common justice if we were to hold that the mortgagee was to let the ship go and sail away for a period of nine months without taking possession of her. I, therefore, think that Bargrave Deane J. did not sufficiently consider what would be the effect on such a security on a vessel worth at the outside 17,000*l.*, growing old, and which could not be run in the most economical way if the money was to be obtained in the way proposed. I think the learned judge ought to have held that the mortgagee was entitled to take possession, and I think that the respondents have failed to shew that the judgment ought to be supported on the ground that the mortgagee ought to have taken proceedings before he took possession.

I think, therefore, that our judgment should be in favour of the mortgagee.

Fletcher Moulton L.J. I am of the same opinion and for the same reasons. It is evident that the person responsible for the management of this ship was hopelessly insolvent. He had allowed her to go about the world from port to port without the money necessary to cover the expenses, and, at last, when the vessel got to Suez, it was found that there was not even money enough to pay the canal dues, or to provide the necessary coals to bring her home.

I have no doubt that Mr. Catt under the circumstances practically consented to the defendant company taking immediate possession, in order to prevent the ship being left where she was, and the result of the mortgagee thereupon strengthening the credit of the master by guaranteeing the bills was that the ship came to Cardiff. It then appeared that the liabilities which the management had allowed to accumulate, and which could be enforced against the ship, exceeded 4000*l.*, whilst the amount of freight due was not more than 2600*l.*, leaving the value of the ship impaired to the extent of upwards of 1300*l.* Within a few days, 2000*l.* would become due on the mortgage.

It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims

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under the mortgage. For example, it cannot be said to be a breach of the rights of the mortgagee, if a ship in distress accepts salvage assistance, though a maritime lien thereby arises. But there is an obvious difference between allowing a ship to become burthened with a maritime lien, and allowing her to remain burthened with such a lien, without the power to discharge it, for, to that extent, you have, as in this case, substantially diminished, that is to say, impaired the value of the mortgage security. Is a ship to be allowed to go on a long voyage incurring ruinous liabilities in the shape of maritime liens which count against her in priority to the mortgage? I am satisfied that equity would never interfere with a mortgagee taking possession under such circumstances as we find in this case, and, therefore, this action asking for a decree that the mortgagor was entitled to possession at the date of the writ cannot be maintained.

KENNEDY L.J. I agree with the judgments that have been delivered, and with the reasoning upon which they are based. I only desire to add that it seems to me that whatever took place on May 14 and 18, the respondents are in a dilemma. Either as Fletcher Moulton L.J. has said, and that may be the true inference, the respondents, through Mr. Catt, really agreed that, in consideration of the assistance which they got, the ship should be taken possession of by the appellants, in which case the respondents cannot complain of that consent, for good consideration, being acted upon, or if the respondents did not assent, and the action which was then threatened was hostile, I think the appellants are entitled to rely upon the nature of the transaction as it stood at that moment. As matters then stood the ship could not get through the canal because she could not pay the dues, and if she paid the dues she had no coal to carry her to her destination. Every day that she remained in that position her value was being impaired, that is to say, the security of the mortgagee was being imperilled, and I do not understand that counsel for the respondents dispute that if the security of the mortgagee was then being imperilled, he can be deemed to be in a worse position when, without the consent of Mr. Catt, he

carried out in Cardiff that which he might have carried out at an earlier date.

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Appeal allowed with costs.

Solicitors for appellants (defendants): *Ince, Colt & Ince.*
Solicitors for respondents (plaintiffs): *C. J. Smith & Hudson.*

NOTE. — On August 14, 1906, the Dowgate Steamship Company, Limited, as plaintiffs, issued a writ addressed "to the owners and parties interested in the steamship *Manor* of the port of London, and the freight due for the transportation of the cargo lately laden on board," claiming "under a registered mortgage against the steamship *Manor* and her freight (to be brought into court in the previous action) the sum of 10,250*l.* as the amount due to them for principal interest and costs and such further sums as may be necessary and believed to amount to 5000*l.* and upwards to cover all maritime liens on the said steamship." On October 31 and November 2, statement of claim, and defence and counterclaim, were respectively delivered, and the same counsel appeared and were instructed by the same solicitors as in the previous case. The action was tried on November 6 and 7 by the President (Sir Gorell Barnes), who found in favour of the plaintiff mortgagees, holding that default had taken place in respect of the payment on June 29 or 30, 1906, of the instalment of 2000*l.* due, under the contract, twenty-four months after delivery, and that, in consequence the whole of the purchase-money then unpaid became due. The learned judge continued:—

The mortgage in pursuance of the contract effected appears to have been duly executed, and seems to go rather further than the contract itself, because after providing for the security of 10,000*l.* and the interest, it also seems to me to secure any further sums which might become due to the mortgagees on account current. However, although it does seem to go beyond the terms of the contract, as the Manor Steamship Company, who gave the mortgage, were also parties to the contract, I do not see why they should not extend the security given by the mortgage if they chose to do so.

It is not necessary to go into details with regard to earnings. Those have been discussed to some extent in the previous action, which was tried before Bargrave Deane J.

The vessel, as far as I can make out, was not at all successful. Shortly before the time when litigation began between the two parties she was on a homeward voyage from Australia to Cardiff. When she got to the Suez Canal the owners had not money with which to pay the canal dues, or for the coals which were necessary to bring the vessel home. Thereupon considerable discussion took place between Mr. Catt on the one side, and Mr. Dillon on the other side, as to what was to be done. Telegrams and letters relating to the matter have been put in. The first of these is a telegram, dated May 18, and sent by Mr. Dillon to the master. It informed the master that several of his drafts were unpaid by the owners,

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and gave him notice to hold the steamer on account of the mortgagees. There are several other documents, one of which is a letter from the Dowgate Steamship Company to Moxey, Savon & Co., guaranteeing the due payment of drafts should the Manor Steamship Company fail to meet them. The result was that the master got his dues and coals paid for, and, as I understand, he drew bills for the amount. Those bills became due after June 30, and the Dowgate Steamship Company are ultimately liable for them if they are not met and paid by the owners of the ship. Prior to this time, as I understand, there had been default on the part of the owners of the ship in respect of other bills which had been drawn long before in the course of the vessel's voyages. Some 700*l.* or 800*l.* was still due on what have been called the Durban bills. The result was that this ship was on her way home through the canal with liabilities outstanding, and with her owners unable to finance her and asking the mortgagees to do it. According to the finding of fact which I have arrived at, whatever view may be taken of the decision of Bargrave Deane J., it seems to me on the evidence before me—the matter has to be determined only on that evidence—that Mr. Catt on behalf of the Manor Company and with the authority of the Manor Company—because he was substantially the company—assented to the mortgagees taking possession of the ship. Mr. Dillon has sworn that on May 18, about the time of these letters and telegrams to the master, this letter passed from Mr. Dillon to Mr. Catt. [The learned judge read the letter of May 18, 1906, already set out, and continued:—] It seems to me that as a matter of fact, having regard to the evidence of Mr. Dillon, it was assented to that he should take possession on behalf of the Dowgate Steamship Company, and help the ship and the Manor Steamship Company out of the difficulties in which they then were. That appears to me to be the fact, whatever may be the legal position as determined by the previous case. Then, on June 12 this vessel got to Cardiff, and thereupon Mr. Dillon goes to Cardiff and finds—not an unnatural state of things—that the master, being liable for all these drafts, had arrested the ship and freight for his wages and disbursements. I understand the master's wages are put down at nearly 400*l.*; there was a sum of 100*l.* said to be claimed by him for safe navigation; and there was a doubtful question about an advance of 500*l.* There was also a claim for damages for wrongful dismissal. It is not disputed that the master was liable on the Durban bills, and on some other bills for coal, and also on bills for canal dues. Altogether, as I understand, his wages and liabilities come to a very heavy sum. In addition to that the crew were threatening and demanding their wages, amounting to 1044*l.* 18*s.* 11*d.* In that state of things, with the arrest of the ship delaying the discharge of the cargo, something had to be done at once, and certain notices were given by the solicitors for the mortgagees. One notice stated that they undertook to give bail in the master's action, and another instructed Messrs. Spillers & Bakers, the consignees of the cargo, to pay the freight to the mortgagees. The freight amounted to something like 2650*l.* Up to that time there appears to have been no protest from the Manor Steamship

Company of any sort or kind against what the mortgagees were doing, and, although Mr. Catt was at Cardiff, he was not in a position to pay off these claims, and nothing was done by him. The undertaking to put in bail in the master's action having been given, on the 14th the vessel was released, and on the 15th this order was made in the master's action by Bucknill J.: "Upon hearing counsel for the Dowgate Steamship Company, Limited, mortgagees in possession of the steamship *Manor*, interveners herein, and counsel for the plaintiff, the judge gave leave to the mortgagees to pay to the crew of the said steamship such wages as may be properly due to them for their services on board thereof; and he directed that in respect of such wages the mortgagees do have the same lien on the vessel and freight as the crew would have had had proceedings been instituted against her on their behalf for the recovery of the said wages; that the application in respect of the master's wages, disbursements and liabilities do stand over for a week, that no further proceedings be taken herein in the meantime, and that the master forthwith deliver his portage bill to the mortgagees' agent at Cardiff. Costs of this application to be costs in that action." In consequence of that order the mortgagees, fearing rearrest by the crew, very properly paid off the crew, and they have since paid other amounts for discharging the cargo—in all about 1300*l.* On June 18 the solicitors for the Manor Steamship Company wrote to Messrs. Spillers & Bakers, the consignees, directing them not to pay the freight to anybody other than the owners of the ship, and a writ was issued on the same day against the Dowgate Steamship Company, in effect to recover from them the possession of the steamship *Manor*. That action came on for trial on June 28 last, and a decision was given by Bargrave Deane J. on August 11 in favour of the plaintiffs, the Manor Steamship Company. The ground on which the learned judge proceeded appears to have been that on June 18 there was no default on the part of the mortgagors under the mortgage, but the point appears to have been also taken on behalf of the mortgagees that, apart from any question of default, the mortgagees were entitled to take possession because their security was being imperilled by the mode in which this vessel was being dealt with. I am not really sure whether the learned judge dealt with that point at all. The passage in his judgment seems not really to go into it other than by saying, if it is so to be read, that the point was not established. I am told that judgment is under appeal, and I do not propose to criticize it or to deal with it in any form. It is binding upon me as determining the position of the parties on June 18 last.

The question is whether what has occurred since has altered that position, and the facts are these:—On June 29 or 30 the first of the instalments of 2000*l.* became due, and that was not actually paid, nor has it been paid, nor the interest upon it. The contention on the part of the present plaintiffs is that there has been a default under the mortgage deed. On the other hand, the present defendants say that, having regard to what has taken place, there has been no default, and that the money must be treated as having been paid. For some reason or other the decision in the former case was, as I have stated, given on August 11, but in

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the meantime the default, if it was a default, had occurred. If I remember the dates rightly, on June 25 the cargo had been discharged and the freight was then due from the consignees for the carriage of the cargo. That freight was brought into court in pursuance of the order of Bargrave Deane J. in the action between the mortgagors and the mortgagees. That money is now in court. The point that is taken about that is this, that on the occasion of the judgment being delivered, or at any rate by a letter of August 13, the defendants in the present case allocated the freight, or so much of it as was necessary, to the payment of the first instalment. That letter, I may say in passing, seems really to assume that there was an account current, and that some of the freight would be allocated to that if it could be so applied. The point now taken is that, although there had been a non-payment of the 2000*l.* instalment at the end of June, yet it ought to be treated as having been paid, because the amount of freight which I have mentioned—some 2600*l.*—was wrongfully stopped by the mortgagees, and would, but for that wrongful stoppage, have been in the hands of the owners of the ship, and they would then have had it and could have tendered and paid the amount of the instalment. It is said it was wrongfully stopped because of the writ which was issued by the mortgagees claiming possession of the ship, and because they had indicated to Messrs. Spillers & Bakers, that they were not to pay it to the owners of the ship. That being so, it is said, "You stopped us from getting our money, which would have enabled us to pay off the instalment. As soon as we could, under the judgment in our action, we appropriated the money to the payment of the instalment, and must therefore be taken to have paid it and not to have committed default."

I am of opinion that there distinctly was a default at that time, and that it is not a sound proposition which is put forward by the owners, that what has taken place has deprived them of money which would have enabled them to pay the instalment. What seems to me to be the position is this, that on the arrival of the vessel the owners were completely in default as regards their incapacity to pay and their failure to pay the master and crew, and the mortgagees were quite justified, in order to protect their own interests and property, in dealing with the master and in paying off the crew. They not only paid off the crew simply because the crew had to be paid, but they had the judge's order, which I have read, giving them leave to do so, and giving them the right to stand in the shoes of the crew. Whether that order is operative so as to give them the same maritime lien that the crew had it seems to me unnecessary to determine. They have, at any rate, done this: They have at the request, legally speaking, of the owners of the ship, paid off the crew. I think that was in fact assented to by the Manor Company, because that company really must have known about it. Whether that is a sound view of the facts or not, at any rate, legally speaking, the mortgagees were entitled to pay off the crew, because the crew were ready to press their maritime lien for wages against property in which the mortgagees were interested. The owners were legally liable to pay the claims of the crew, and so, the moment the mortgagees paid the money at the request of the owners, the owners

became indebted to the mortgagees in a sum of over 1000*l*. Therefore, all that can be said is that if the owners had had the freight in their possession they would have had 1600*l*., which they might have tendered in payment of the instalment. That would not have done—it would not have been enough—and whatever view is taken of this matter it seems to me that makes an end of the case, because there was in fact default. It is of no use counsel for the Manor Company saying that they could have appropriated a thousand pounds to any debt they chose, when the appropriation was not made at the time the default originally occurred. The money was afterwards brought into court, but there was not enough to pay both debts. The mortgagees having the judge's order and having acted as they did, it seems to me there was not money which the owners could appropriate to paying off the instalment. That being so, the default seems to me established, and with the default, after what I have already said, there follows the right to treat the default as applicable to the whole of the purchase-money remaining unpaid. That puts the mortgagees in the position of being entitled to ask that their security should be used to pay off their mortgage debt. It has been suggested that the order of the judge was on some terms that the mortgagees should not re-arrest, and should not press their claim for possession, but I cannot find any trace of that. The result therefore seems to me to be that there was default.

I desire, however, to say a word about other points that have been referred to. There is the point about the account current. I do not know that I can deal with that, because it has been dealt with by Bargrave Deane J., and it must, if required, be dealt with by the Court of Appeal. The other point is as to the question of imperilling the security of the mortgagees. If that point were put forward, and it were necessary to determine it, I do not think I could deal with it on the basis of anything which occurred before June 18. If it rested with me to decide the present case upon that point, however, and the pleadings were amended for the purpose of allowing that point to be raised, it seems to me there would be ample grounds for determining that what the mortgagors intended to do was imperilling the security of the mortgagees. As Mr. Catt admits, the vessel was to be sailed about on credit, and the master would be incurring heavy liabilities at various ports for dues and coals. It seems to me that where the facts are such as the broad facts of this case the mortgagee is entitled to step in and say "If you go on like this I shall risk every bit of my advance." Nothing would be more likely to happen than that the ship might be arrested at any time. I think this case, at the time when the present action was brought, was a case of that character, and if the point that the security of the mortgagees was being imperilled had been taken I should have been prepared to decide the case upon that point alone. I think, however, the mortgagees are in the right in saying that there has been default, and the prayer of their statement of claim must in substance be assented to; that is to say, the judgment must pronounce for the validity of the mortgage and declare that the mortgagees were entitled to take possession of the ship as they did in this action. As they ask for it, and as the circumstances necessitate it, the ship must be appraised

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and sold by the marshal and the proceeds brought into court. The master or his assigns will now be able to put forward his claim against the fund in court. That being so, I think the mortgagees should be released from their undertaking to put in bail in the master's action. The mortgagees must also have judgment condemning the proceeds of the ship when sold in the amount due to them for principal and interest and on account current and for costs, charges and expenses reasonably incurred by the plaintiffs as mortgagees.

T. L. M.

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April 19; *July* 15.

[IN THE ARCHES COURT OF CANTERBURY.]

In re ST. JAMES THE GREAT (CHAPEL OF EASE), BUXTON; THE VICAR AND CHURCHWARDENS OF ST. JOHN THE BAPTIST, BUXTON (NATION AND OTHERS) *v.* ALL AND SINGULAR THE PARISHIONERS AND INHABITANTS OF THE SAME.

[APPEAL FROM THE CONSISTORY COURT OF SOUTHWELL.]

Ecclesiastical Law—Faculty—Grant of Faculty for Erection of Second Communion Table—Partition of Chapel from rest of Church not essential—Discretion of Ordinary—Practice—Inhibition and Citation in Court of Arches.

A faculty may, at the discretion of the Ordinary, be lawfully granted for the erection of a second communion table in a parish church or chapel of ease.

It is not essential to the legal existence of a second communion table authorized by such a faculty that the portion of the church or chapel of ease where the second communion table is placed should be partitioned off from the rest of the church or chapel, but the circumstances which warrant the grant of the faculty and the structural and other arrangements which should be made in any particular church or chapel when a second communion table is sanctioned are matters to be decided by the Court granting the faculty in each case.

The vicar and churchwardens and certain parishioners of a parish church in the diocese of Southwell applied in the Consistory Court of Southwell for a faculty authorizing and empowering the vicar and churchwardens to place an altar with a cross and two candlesticks thereon, or on a ledge in rear, and a credence table adjoining at the north end of the south transept of the church of St. James the Baptist, a chapel of ease within the same parish, the costs to be defrayed privately. At the hearing of the application it was proved that the use of the nave of St. James' Church for early celebrations of the Holy Communion was

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inconvenient, and that by the use of the south transept for such celebrations great expense in lighting the church in the winter would be saved; that a resolution in favour of the application had been passed by the parish vestry without opposition; and that the south transept would hold about fifty people, and had for some time been in use for daily morning service. The Court came to the conclusion that the case before it was one in which, if the faculty prayed for could be legally granted, a decree for its issue should as a matter of discretion be made, but refused to decree the grant, on the ground that it had legally no power to grant a faculty for the erection of a second holy table in a parish church or chapel of ease.

The applicants for the faculty appealed.

The Dean of the Arches allowed the appeal, and directed that the faculty applied for should issue.

In this case a cause of faculty had been originally instituted in the Consistory Court of the diocese of Southwell on behalf of the Rev. Charles Codrington Nation, the vicar, and Godfrey Davenport Goodman and Frederick Rowland, the churchwardens, of the parish of St. John the Baptist, Buxton, in the county of Derby and diocese of Southwell, and certain other parishioners (ten in number) of the same parish, for a faculty authorizing and empowering the vicar and churchwardens to make certain alterations in the church, or chapel of ease, of St. James the Great in the same parish.

The petition in the suit was dated March 14, 1907, and set forth the alterations proposed to be made under the faculty prayed for, and the reasons alleged by the petitioners in favour of such faculty being granted, so far as material, as follows:—

"For the greater convenience of the parishioners and others attending the church of St. James the Great, Buxton, it is proposed to place an altar with a cross and two candlesticks and flower vases thereon or on a ledge in rear, and a credence table adjoining, at the north end of the south transept of the said church, as shewn on the plan annexed to the petition, the costs of such proposed alterations to be privately defrayed."

"At the present time worshippers sitting in the south transept cannot see the chancel choir or pulpit. The south transept is practically cut off from the church, and can only be fully utilized as a separate chapel. The provision of a separate chapel will be a convenience to those attending weekday services

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and celebrations of the Holy Communion. A resolution has been passed by the vestry of the parish in favour of the application for a faculty. No faculty seats, mural monuments or memorials, &c., will be removed, or any other private rights affected, and the performance of Divine service will not be prevented during the performance of the work."

The petition concluded with a prayer that a faculty be granted for all and singular the purposes above mentioned.

The usual citation with intimation duly issued out of the registry of the Consistory Court of Southwell on March 22, 1907, and was served by being affixed on or near to the principal outer door of the church of St. James the Great, Buxton, on Sunday morning, June 24, 1907, remaining affixed there ten days thereafter, but no appearance was entered for any opponent. (1)

1907. April 19. The suit was heard before the Chancellor of the diocese of Southwell (A. B. Kempe, Esq.).

A member of the firm of the solicitors for the petitioners moved the faculty.

[The Chancellor intimated that he was prepared to hear evidence on behalf of the petitioners as to the desirability and convenience of the faculty prayed for being granted as a matter of discretion, but that, in his opinion, there was a preliminary point of law to be decided as to whether he could legally grant a faculty for a second holy table in a church or chapel of ease.]

The curate in charge of St. James' Church, the vicar of St. John the Baptist, and one of the churchwardens of the parish were then examined on behalf of the petitioners. Their evidence was to the effect that St. James' Church was a chapel of ease to St. John the Baptist, Buxton, having no separate churchwardens; that the south transept of St. James' Church would hold about fifty people, had for some time been in use for daily morning service, and by the use of it for the early celebrations of the Holy Communion a great deal of expense in lighting in the winter would be saved, and a further expense would be saved if the

(1) The service of the citation as above was effected by the curate in charge of St. James' Church, who also affixed on the church door a copy of the petition and signed the certificate of service.

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south transept was separately heated, whilst the use of the nave for early celebrations was inconvenient; that a resolution of the vestry of the parish in favour of the application for the faculty had been passed without opposition; and that the seats in the south transept were very inconvenient for use at any service in the body of the church, as the transept was practically cut off from the nave and chancel.

THE CHANCELLOR. Before the hearing of this case I personally inspected St. James' Church. The south transept is shut off from the chancel by a wooden screen with a passage way in it, and from the nave by a curtain. It is clearly inconvenient for use by the congregation during services in the nave, and would be so even if there were no screen or curtain. It would be convenient for services where there is a very small congregation. Taking these matters into consideration, and on the evidence which has been called before me, I have come to the conclusion that this is a case in which, if I had the legal power to grant a faculty for a second communion table, I would exercise such power and decree the grant of the faculty prayed for. But have I any such legal power? The question of the legality of a second holy table came before me sitting as the Chancellor of the diocese of Newcastle eighteen years ago in the case of *In re St. George, Newcastle-on-Tyne.* (1) In that case I decided, in a carefully considered judgment (1), that I had no legal power to grant a faculty for the erection of a second holy table in a church. That decision I have ever since regarded as binding on me and cannot now depart from, having consistently adhered to the opinion I there expressed in all the dioceses of which I am Chancellor, and though I have constantly urged the desirability of an appeal from my refusals to decree the grant of faculties for second holy tables, no such appeal has ever been brought. It is quite impossible for me to now reopen the question. I must regard that decision as binding on me, and cannot have it reargued. If the question is to be reconsidered, it must be by the Dean of the Arches on an appeal.

(1) *Law Journal* newspaper for June 22, 1889, pp. 375—378, and post, p. 381.

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The Chancellor.

The decision I have referred to is directly applicable to the present case, as a celebration of the Holy Communion in the south transept, where it is asked that the second table should be placed, would be clearly a celebration in St. James' Church, Buxton—a church already provided with a holy table in the usual place at the east end of the chancel. I must therefore refuse to decree the faculty prayed for in this case for the reasons set forth in my judgment in the case of *In re St. George, Newcastle-on-Tyne.* (1) As, however, some of my brother chancellors obviously do not take the same view of the law and have decreed the grant of faculties for second holy tables, it may be that the Dean of the Arches will take the view that my decision in the above case was wrong, and that I have power to authorize the erection of second holy tables. If this were so, the question would arise whether, on the facts of this particular case in the exercise of a judicial discretion, the faculty here should be granted; and, as I have seen the church and heard the evidence in support of the petition, I have thought it right to state, as I have already done, that this is a case in which, had I the power to do so, I should exercise it and decree the faculty prayed for. For the reasons above stated I must, however, refuse the application to grant the faculty prayed for, on the ground that I cannot lawfully make the grant.

The petitioners appealed against the decree entered in pursuance of this judgment.

1907. June 5. A cause of appeal having been instituted on behalf of the vicar of the parish of St. John the Baptist, Buxton, and the churchwardens of the same parish, in the Arches Court of Canterbury, a monition for process this day issued out of the Arches Court Registry, together with an inhibition and citation inhibiting the judge of the Court below, his surrogate or surrogates, registrar or actuary, and all others in general, that, pending the cause of appeal, neither they nor any of them do innovate or attempt to do, or cause or procure to be innovated or attempted or

(1) See post, p. 381.

done, anything to the prejudice of the appellants or the jurisdiction or authority of the Arches Court, and further citing the parishioners and inhabitants of the parish of St. John the Baptist, Buxton, in special, and all others in general, to appear in the registry, on the sixth day after service, to answer on the appeal; and to do and receive as unto law and justice should appertain. The inhibition and citation was subsequently duly executed (1), but no appearance was entered for any respondent in the appeal.

1907. July 15. The appeal was heard before the Dean of the Arches (Sir Lewis T. Dibdin, D.C.L.)

Hansell appeared for the appellants. The application for the faculty prayed for in this case has the approval of the vestry of the parish, and the judge of the Court below would have granted it if he had not thought on legal grounds that he had no power in any case to sanction the use of a second communion-table in a church or chapel of ease, and in so rejecting the application he acted on the same grounds as were relied upon by him in the case of *In re St. George, Newcastle-on-Tyne* (2), an application for a similar faculty heard by him as Chancellor of the diocese of Newcastle in 1889. (2) That decision, however, proceeded on an erroneous view of the law—the Court there having, in the first place, placed a wrong construction on those rubrics of the present Prayer Book where the communion table is referred to, by construing them not as directions for the service to be held in any particular case, but as if such rubrics were exhaustive and to be construed strictly as an Act of Parliament providing for one,

(1) The inhibition and citation was duly executed by affixing the same for some time on or near the principal outward door of St. John the Baptist Church, Buxton, and also on or near the principal outward door of the church or chapel of ease of St. James the Great, Buxton, and by leaving thereon respectively a copy thereof previous to morning service on Sunday, June 9, 1907, and also by shewing the same to the Registrar of the Consistory Court of Southwell, and leaving with him a copy thereof. [The service was effected by a member of the firm of the appellants' solicitors acting in the place of the apparitor of the Court.]

(2) See post, p. 381.

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and only one, communion table in a church. The rubrics of the present Prayer Book ought, indeed, no more to be construed as prohibiting more than one communion table than the rubrics in the Sarum Missal or the Roman Missal, by specially referring to "the altar," can be construed to import that no other than one altar was in use under them, or that by the reference to "the pulpit" in a church it is implied that no more than one pulpit may lawfully be placed there.

Secondly, in the judgment in question (1) the well-known principle of law is disregarded that where a later enactment is worded in positive terms only, without a negative express or implied, it does not repeal any previous provision of the common law [he referred to *Escott* v. *Mastin* (2); Maxwell on Statutes, 4th ed. p. 254]; and this principle is clearly applicable to the matter at issue here, as it is undoubted that by the common law there might be many altars in one church, and no negative words are found in the Prayer Book or any other enactment prohibiting the use of more than one communion table in a church. Moreover, the judgment in *In re St. George, Newcastle-on-Tyne* (1) pays no regard to the very pertinent evidence in favour of the legality of second communion tables in a church afforded by the fact that second communion tables are at the present time in use in many cathedral churches, and have never been held illegal, or even objected to, on proceedings held before the visitors having jurisdiction over such cathedrals. [He referred to Phillimore's Ecclesiastical Law, vol. 1, p. 724.]

[THE DEAN OF THE ARCHES referred to a note in the 1st vol. of Dr. Stephen's "Book of Common Prayer," pp. 337, 338, on the rubric which directs that "The morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel—as containing statements as to the services in Latin formerly held in the Latin Chapel in Christ Church Cathedral, Oxford, and the services held in the lady chapels of other cathedrals.]

Great importance is, in the judgment in the *St. George, Newcastle-on-Tyne Case* (1), attributed to the documents there cited,

(1) See post, p. 381.
(2) (1842) 4 Moo. P. C. C. 104, at p. 130.

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and set out in Cardwell's Documentary Annals (1), with respect to the removal of altars in the reign of Edward VI. and Elizabeth, but apart from the question whether those documents had the force of law, as to which there is much doubt, it is clear that the object of those who issued them was not to prohibit the use of several communion tables when needed in a church, but to ensure that the use of "the altars" under the former system should not continue; whilst, if it was ever intended that the orders given as to removal should allow only one communion table to remain, it was because of the rubric in the First Prayer Book of Edward VI., which, by requiring the communicants to assemble in the quire, impliedly directed that the Communion Service should be held there. But this direction is not to be found in the present Prayer Book, and it is now directed that the communion table is to stand in the body of the church or in the chancel where Morning and Evening Service is appointed to be said. This, it is contended, may be in a lesser chancel or in a side chapel, as customary or as determined by the Ordinary (see rubric before "The Order of Morning Prayer" in the present Prayer Book).

In Queen Elizabeth's Injunctions it was further ordered in 1559 that "no altar be taken down, but by the oversight of the curate of the church and the churchwardens, or one of them at least, wherein no riotous or disordered manner to be used": Hierugia Anglicana (Library of Liturgiology and Ecclesiology for English readers, edited by Vernon Staley, vol. 1), part 1, pp. 27, 28, London, 1902; Cardwell, Documentary Annals, vol. 1, pp. 233, 234. And it would appear that in many cases "the altars" were not removed, but the Queen's Commissioners were content that they should continue standing. [He referred to Heylyn's Coal from the Altar, 1637, cited Hierugia Anglicana, part 1, pp. 33, 34.]

In the result there is no prohibition, either express or implied, against the use of a second communion table in a church or chapel of ease, and nothing to interfere with the common law, under which several altars or holy tables may be placed there legally, even if the rubric at the commencement of "The Order of

(1) Cardwell's Documentary Annals, vol. 1, pp. 76, 95, 101, 234, 238, 326, 335. See post, p. 381.

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Morning Prayer" in the present Prayer Book that "the chancels" —the places in the church partitioned off from the body of the church—"shall remain as they have done in times past" is not to be construed as expressly bringing back the continuance of the altars.

Thirdly, the "convenience" required by the 82nd Canon of 1603 can only be secured by the rule being adopted that where the Ordinary thinks fit a second communion table may be provided in any portion of the church where Morning and Evening Prayer are appointed to be said.

The view of the law taken by the judge of the Court below has not been adopted in other dioceses and faculties, for second communion tables have been granted by the Chancellor of the diocese of London in the following reported cases, in which, it is submitted, the law has been correctly laid down: *In re Holy Trinity, Stroud Green* (1); *Re St. Paul's, Wilton Place* (2); *The Vicar and Churchwardens of St. Peter's, Eaton Square* v. *The Parishioners of the Same* (3); *In re St. Mark's, Marylebone Road, The Vicar of St. Mark's, Marylebone Road, and Others* v. *The Parishioners of the Same.* (4)

[The following additional authorities were also referred to: *Westerton* v. *Liddell* (5); *Faulkner* v. *Litchfield.* (6)]

THE DEAN OF THE ARCHES. If I thought I could deal with this case better by reserving judgment I should do so. But, having had the assistance of a full argument from counsel, I do not think it would be of any advantage to postpone my decision.

The question which arises on this appeal is whether a second holy table can, under any circumstances, be legally permitted in a church, or whether the law of the Church of England requires that there should be only one holy table in every

(1) (1887) 12 P. D. 199.

(2) (1889) Tristram's Rep. 120.

(3) [1894] P. 350.

(4) [1898] P. 114. See also *The Rector of St. Anne's, Limehouse* v. *The Parishioners of the Same*, [1901] P. 73; *The Vicar and Churchwardens of Paignton* v. *All having Interest*, [1905] P. 111; *In re St. Peter's, Cranley Gardens*, Consistory Court of London, June 14, 1907; *Times* newspaper, June 15, 1907.

(5) (1855) Moore's Special Report, p. 8.

(6) (1845) Roberts. 184, at pp. 243, 244.

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church and chapel intended for public worship according to the rites of the Church of England. Chancellor Kempe refused a faculty for a second holy table, for reasons stated in his judgment in a prior case decided in the diocese of Newcastle in 1889, which is referred to as the *Jesmond Case.* (1) He came to the conclusion that when the rubrics speak of "the holy table" a particular holy table is referred to. He was of opinion, on an historical examination of the successive Prayer Books from 1549 downwards, and of various contemporary documents, as, for instance, articles exhibited in royal and episcopal visitations, that the mention of "the holy table" means that there is to be only one, and that the rubrics, therefore, prohibit the use of more than one holy table in each church. I have so great a respect for Chancellor Kempe's opinion on any question of ecclesiastical law that I cannot but feel doubt and hesitation in differing from him. Nevertheless, I find myself compelled to do so. I so far agree with him that I think the language of the Prayer Book, while it requires one holy table, does not require more than one, and does not indicate that more than one was contemplated by those who compiled the rubrics. But that is a very different thing from prohibition. It has been well pointed out by Mr. Hansell that the rubrics of the Missal—at any rate, of the Sarum Missal—in the same way speak of the altar, not, of course, because there was only one in pre-Reformation churches, but because the rubrics refer to the altar being used for the particular service. I think the nearest approach to prohibition contained in any of the English Prayer Books is in a rubric in the First Prayer Book of Edward VI., where it is directed that the communicants should be gathered together for a celebration in and near to the "quire," and by inference, therefore, that the altar should be there. But it would, in my opinion, be straining language to treat this mention of the "quire," which disappeared from the Prayer Book in 1552, as if even prior to that date it was an implicit command that there should be one holy table only in every church. When the holy table is spoken of it seems to me clear that it means the holy table then being used, just as "the grave" in the Funeral Service

(1) See *In re St. George, Newcastle-on-Tyne*, post, p. 381.

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means the grave in which the dead is about to be placed at each particular funeral. "The cup" and "the paten" in the rubrics of the Communion Service mean those used for the particular celebration at which the service is being employed. In the same way "the reading pew or pulpit" in the Commination Service could not reasonably be taken to denote a prohibition of a second reading-pew or pulpit in any church, but is merely an indication that the priest is, at the point of the service at which the rubric occurs, to occupy a reading-pew or pulpit. In all these cases the language seems to me to be neutral on the question of whether more than one holy table, or more than one cup or paten, or more than one pulpit can exist in one and the same church. That the altar as mentioned in the First Prayer Book of Edward VI. did not always and exclusively mean the high altar of a church is, I think, plain from the fact that the rubrics of that Book contemplated that the Communion Service would be used, not only in churches, but also in "private houses," and especially in the houses of the sick. A similar observation might be made with regard to the words "the Lord's table," as employed in the Communion Service of the present Prayer Book. But reliance is placed on Bishop Ridley's Visitation Articles of 1550 and on the Privy Council's letter to Bishop Bonner (1549), prohibiting the use of special masses under a colourable evasion of name "in private chapels and other remote places" of St. Paul's Cathedral, and requiring all celebrations of Holy Communion to be "at the high altar of the church and in no other place of the same," and to be "executed" there "as it is appointed in the book of the public service without cautele or digression from the common order." It is said that such documents may be properly used by way of contemporary exposition of the rubrics of the Prayer Book. That is so, and they are of great value in that relation, but we must be on our guard against employing them, not for the purpose of explaining what the rubrics say, but for the purpose of adding things which the rubrics do not say. Nothing was more natural than that the authorities in 1549 and 1550, having to provide, so far as practicable, against a recurrence, by ingenious artifices and in unobserved places, to the old service which had been abolished,

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should as an administrative act insist that the Communion Service should be celebrated nowhere in church except at the high altar, and in circumstances of as great prominence as possible. It is clear that this is what was done in terms which are quite unambiguous. But it was done by means which, whatever their authority at the moment, did not lay down law binding on later generations. Instead of reading these prohibitions of the use of a second holy table into the Prayer Book, where nothing like them is to be found, it seems to me that we should rather take note that they were issued in a shape which give them the character of temporary regulations belonging to that time only, and were not included (though, had it been intended, they might have been included) in the rubrics which, by virtue of the Acts of Uniformity, were made permanently binding on the Church of England. Reliance is also placed on the Elizabethan Injunctions (1559), the Advertisements (1566), and various Visitation Articles of the sixteenth and seventeenth centuries, in which, to quote Mr. Kempe's judgment in the *Jesmond Case* (1), the holy table is said to be treated as "a definite single structure standing in a single *loco certo*." But when these documents are examined it is seen that they are not concerned with the question of one or more than one holy table, but with the then pressing matters of substituting tables for altars, and of providing that the tables should be movable for use at the Lord's Supper, but at the same time should be treated with decency and reverence. Naturally, these directions are conveyed in language which assumes the normal case of one holy table only in a church. But they are as easily applicable to several as to one, and they cannot, as it seems to me, be properly used as expressing an opinion on a point to which they were not directed. I do not think, therefore, that the fact that various ecclesiastical and civil authorities in 1550 forbade the use of any but the high altar or holy table in the main chancel, or the fact that similar authorities in Queen Elizabeth's and the following reigns made regulations with regard to the holy table in terms which seem to assume that there was but one holy table in every church, can be validly used in order to read into the rubrics of the

(1) See *In re St. George, Newcastle-on-Tyne*, (1889) post, p. 381.

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Prayer Book a prohibition, not to be found in the Prayer Book itself, of a second holy table as something unlawful and not permissible. If it were otherwise it would be difficult to account for the long-established existence in our cathedrals of more than one holy table.

I come to the conclusion that a second holy table is not prohibited, and, if introduced with the sanction of the Ordinary by means of a faculty, is a legal fitting of a church. The circumstances which warrant such a faculty and the structural and other arrangements which should be made in any particular church when a second holy table is sanctioned, are matters to be decided by the authority granting the faculty in each case. It has been laid down in some cases (1) that the portion of the church in which a second holy table is situated must be partitioned off from the rest of the church. This no doubt is often, perhaps generally, a desirable arrangement, but I do not think it affects the question of the legality of a second holy table, or can be treated as an essential condition of its lawful existence. A portion of a church so divided from the rest of it either remains or does not remain part of the church. If the former, the arguments I have dealt with are as applicable to it as if no such separation existed. If it does not remain part of the church, but is to be regarded as a separate chapel, then I agree with Mr. Kempe in the *Jesmond Case* (2), that "it must be a chapel of one of the descriptions which the law recognizes, with a legal existence distinct from that of a church, and subject independently to the various obligations as to services and other matters which the law attaches to such a structure." I am far from saying that a faculty for a second holy table should be granted in all cases in which it is applied for. It is obvious that it might

(1) See *In re Holy Trinity Church, Stroud Green*, 12 P. D. 199, at p. 200; Tristram's Rep. 117; *In re St. Paul's, Wilton Place*, Tristram's Rep. 120; *Vicar and Churchwardens of St. Peter's, Eaton Square* v. *Parishioners of Same*, [1894] P. 350, at p. 352; *In re St. Mark's, Marylebone Road, Vicar of St. Mark's* v. *Parishioners of St. Mark's*, [1898] P. 114; *Rector of St. Anne's, Limehouse* v. *Parishioners of Same*, [1901] P. 73, at p. 77, n.,—Consistory Court of London; *Vicar and Churchwardens of Paignton* v. *All having Interest*, [1905] P. 111, at p. 127,—Consistory Court of Exeter.

(2) See *In re St. George, Newcastle-on-Tyne*, post, p. 381.

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be desired, and might be used, for purposes as mischievous as those which the authorities in the sixteenth century sought to discourage. But it must be borne in mind that although faculties for second holy tables have been very frequently granted in many dioceses during the last twenty years, and second holy tables in large churches for weekday services and early celebrations have become common, instances of their misuse appear to be exceedingly rare. They have been used in nearly all cases simply as a practical means of securing the object aimed at by the 82nd Canon of 1603, which requires the holy table so to be placed that "the minister may be more conveniently heard of the communicants in his prayer and administration," and they may more conveniently communicate with the minister. Under these circumstances it would be regrettable if there were any ground on which it were necessary to prohibit second holy tables in all cases, and I am glad not to be driven to that result. In the present case, apart from the legal question, which I have decided, the learned Chancellor stated his opinion, in which I concur, that on grounds of convenience to those attending St. James' Church, Buxton, the faculty should be granted. The appeal will therefore be allowed, and the faculty will issue.

The cause was remitted to the Consistory Court of Southwell, in order that the faculty might issue from that Court, the following minute of the decree being entered in the Registry of the Court of Arches: "The judge having heard counsel on behalf of the appellants, pronounced for the appeal made and interposed on behalf of the vicar and churchwardens of St. John the Baptist, Buxton, reversed the order or decree appealed from, and directed the cause to be remitted to the Consistory Court of the diocese of Southwell."

Solicitors and proctors for appellants: *Bennett, Boycott, Orme & Goodman; Moore & Currey.*

[IN THE CONSISTORY COURT OF NEWCASTLE.]

In re ST. GEORGE, NEWCASTLE-ON-TYNE.

May 9; June 3, 1889.

THIS was a cause of faculty instituted on behalf of the Rev. Somerset Edward Pennefather, the vicar, and Henry Frederick Swan and John

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Dillon, the churchwardens, and certain other parishioners and inhabitants (eight in number) of the parish of St. George, Newcastle-on-Tyne, in the county of Newcastle-on-Tyne and diocese of Newcastle, for the purpose of obtaining a faculty "to complete and carry out the original design of the church by erecting a holy table and reredos in the chapel in the north aisle of the church of St. George, for celebration of Holy Communion on weekdays and on such occasions when it may not be necessary or desirable to use the whole church."

The petition in the suit, filed April 2, 1889, described the alterations proposed to be sanctioned by the faculty to be as above, and stated that they were in accordance with a plan lodged in the registry; and further stated that the application for the faculty had been approved of by the vestry of the parish; that the total costs of the alterations would be defrayed by Charles Mitchell, Esq., of Jesmond Towers, and as a reason for the proposed alterations that the daily services of the church were performed in the chapel where it was proposed to place the second holy table. The prayer of the petition to grant the faculty was approved of by the then Archdeacon of Northumberland.

1889. May 9. The suit was heard by the Chancellor of the diocese of Newcastle (A. B. Kempe, Esq.).

The vicar of St. George, Newcastle, moved the faculty.

No opponent appeared.

The vicar and the churchwardens of St. George, Newcastle-on-Tyne, and other witnesses gave evidence orally in Court in support of the petition. The result of their evidence so far as material is stated in the judgment.

Cur. adv. vult.

1889. June 3. THE CHANCELLOR. A petition has been presented to this Court by the vicar of the parish of St. George, Newcastle-on-Tyne, known as St. George Jesmond, the churchwardens of that parish, the munificent patron and founder of that church, and other parishioners, praying that a faculty may be granted to authorize the erection of a holy table and reredos in the chapel in the north aisle of the church of St. George for celebration of Holy Communion on weekdays and such occasions when it may not be necessary or desirable to use the whole church. It is also stated in the petition that such erection is to complete and carry out the original design of the church, and that the total costs will be defrayed by the founder. Plans shewing the design of the proposed holy table and reredos and the position of the chapel accompany the petition. At a vestry meeting held on March 16 last the design for the holy table and reredos was approved and the application for a faculty sanctioned. The Archdeacon of Northumberland has added to the petition a statement of his approval and the expression of a hope that the prayer of the petition may be granted. No appearance has been entered in opposition to the grant, but in decreeing citation I ordered that the application for a faculty should be made in open Court, and intimated that the petitioners must be prepared to satisfy me, even in the absence of opposition, that the faculty prayed for could lawfully be granted. The application was heard by me on May 9 last at a Court held in the vestry

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of St. George's Church, when the Rev. S. E. Pennefather represented the petitioners. The morning chapel, as it is termed on the plan, lies at the east end of the north aisle of St. George's Church. The roof is of the same height and slope as that of the rest of the aisle. The floor is on the same level as that of the chancel; the floor of the body of the church, to which the descent is by two steps, being about fifteen inches lower. There is a stone arch between the "morning chapel" and the rest of the north aisle, and another between the "morning chapel" and the chancel. The spaces under these two arches up to the top of the supporting pillars are occupied by open wooden screens about ten feet nine inches in height, which thus separate the "morning chapel" from the rest of the church. The separation is made more complete by curtains which can be drawn to so as to close the open work of the screens; but the archways above the screens are in no way closed. In each screen there is an opening down to the ground, that leading into the body of the church being closed by a door, the other not so. A door in the east wall gives a direct communication between the "morning chapel" and the open air. At the east end of the south aisle a corresponding space to that which constitutes the "morning chapel" is occupied by the organ. At the hearing, in answer to a question from the Court, the vicar, Mr. Pennefather, said that the faculty was asked for, not because it was lawful to have two holy tables in a church, but because the part of the chapel in which it was proposed to place the holy table and reredos was a separate chapel, and he cited two cases which undoubtedly do support the contention that the application could lawfully be acceded to on the latter ground. In the case *In re Holy Trinity Church, Stroud Green* (1), the learned Chancellor of the diocese of London, while intimating that if the application had been to introduce a communion table into the aisle simply he would not be prepared to say that the Court would have been justified in granting it, did feel justified in granting a faculty authorizing the erection of screens such as those which already exist in the present case, and the fitting up of the enclosed place as a chapel to be used for early daily prayer and the administration of early Holy Communion on weekdays and Sundays, and for the latter purpose he also authorized the introduction of a communion table into "what is to be practically a chapel," there being, of course, a holy table already in the chancel. In the other case which has only recently been decided, that of St. Margaret's Church, Belmont, Liverpool, the learned and reverend Chancellor of the diocese of Liverpool is reported in the *Church Times* of May 3, 1889, to have granted a faculty "for a second communion table subject to the condition that the end of the transept in which it was to be erected should be separated from the church by a permanent partition, so that it might to all intents and purposes be reasonably considered a separate chapel altogether. It must," he added, "be borne in mind that this decision was not a precedent for allowing two communion tables, but simply a sanction for one to be erected in a structure which for all practical purposes was a separate structure or adjunct to the church." It is, of course, the duty of the Court to treat

(1) 12 P. D. 199.

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both these decisions with the very highest respect; but it must be observed that in neither case was there any opposition to the grant, nor do the reports of the decisions contain any examination by the learned chancellors of the law bearing on the subject. They cannot, therefore, be regarded as precedents which can relieve this Court if it entertains any doubt upon the matter from the plain duty of carefully examining the law applicable to the case, or can justify it in giving its sanction to anything which may appear as the result of such examination to be unlawful. Similar observations are applicable with regard to the grants of faculties which were said to have been made by the chancellors of two other dioceses. As to the terms of those faculties or the grounds upon which they were granted no information was given, nor does it appear that the grants of any of them were preceded by adverse argument in open Court. I am compelled, therefore, myself to undertake the investigation of the law which affects the case, and to pronounce an independent judgment upon it.

The first question I have to determine is whether, if the faculty prayed for was granted and a holy table was introduced into the "morning chapel," an administration of the Holy Communion in that "chapel" would be an administration in St. George's Church? That it would be I have no doubt whatever. Architecturally speaking, the "morning chapel" is as much a part of the church as is the organ chamber. It is described in the petition as "in the north aisle of the church of St. George." The faculty is asked for "to complete and carry out the original design of the church," and the new holy table is desired "for celebration of Holy Communion on weekdays and on such occasions when it may not be necessary or desirable to use the whole church." That the particular part in question is called a "chapel" and is enclosed by screens can make no difference; the question is not one of names or physical separation, but of legal status. If this consecrated "chapel" is not a part of St. George's Church, it must be a chapel of one of the descriptions which the law recognizes having a legal existence distinct from that of the church and subject independently to the various obligations as to services and other matters which the law attaches to such a structure. Of chapels which are practically separate from parish churches the law knows nothing; if they are to be created it is not by judicial action. That this "morning chapel" has any such separate legal existence as I have referred to distinct from that of St. George's Church it is impossible for me to find, as there is absolutely no evidence whatever of its being so, and I am therefore bound to hold that if the Holy Communion were celebrated in this chapel it would be celebrated in St. George's Church. There is in St. George's Church at the present time a holy table which stands against the wall at the east end of the chancel, in the position which is customary and sanctioned by law. With this holy table it is not proposed to interfere in any way, and the question which remains for me to decide is whether, in future celebrations of the Holy Communion in St. George's Church, the requirements of the law will be satisfied if the proposed holy table is sometimes used instead of the existing one. The determination of this question must depend upon the meaning which is to be given to the words "the Lord's table," "the holy table," "the table" in the rubrics of the Communion Office. If those

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words merely refer to such holy table as is used in the administration of the Lord's Supper, the directions in the rubrics would possibly admit of one table being used at one celebration and another at another. But if they refer to a specific table, the table of the church, and the rubrics in consequence contain directions as to what is to be done with that specific table at the communion time, and as to the position and acts of the priest with regard to it, it would be a violation of the law if those directions were obeyed as regards some other table but not as regards the specific table to which they refer. In considering the interpretation to be put upon the rubrics in question, I adopt the course which is expressed in the words of the learned judgment of a former Dean of the Arches, Sir Herbert Jenner Fust, in the well-known case of *Faulkner* v. *Litchfield.* (1) "But, in order," says the learned judge, "to arrive at the true meaning of the expressions which are used in the present rubrics, it may not be improper to consider the sense in which the same terms were used at the time at which the alterations were made at the era of the Reformation; and from that date down to the passing of the Act which is now in force, which establishes the present Book of Common Prayer and the Order of the Administration of the Sacraments of the Church; and also to review what has taken place downwards to the present time." In pursuing this course it will not be necessary to enter upon any elaborate search for authorities. The sources from which the materials may be drawn are well known, and are fully indicated in the judgment from which I have been quoting, and in nearly every instance the materials themselves to which I here refer are considered there also. As regards those materials, I would at the outset make the general observation that what may have been their legal force I do not stop to inquire; it does not affect the present question, which is one solely as to the meaning of certain rubrics. Those documents which precede the passing of any rubrics into law, I treat merely as historical facts enabling us to understand the subject-matter to which those rubrics relate and the meaning of the words employed, while those which are subsequent in date I treat as of value only in so far as they are public and official acts which shew what has been the meaning generally given by contemporaneous and long usage to such rubrics.

Under the first Act of Uniformity, which became law in 1549, the First Prayer Book of Edward VI. came into use on June 9 of the same year. In that book it is ordered, "Then so many as shall be partakers of the Holy Communion shall tarry still in the quire . . . . the men on the one side and the women on the other side. All other (that mynde not to recieve the said Holy Communion) shall departe out of the quire; except the ministers and clerks." In the face of this rubric it could hardly be doubted that the various other rubrics of the First Prayer Book as to "the Supper of the Lorde and the Holy Communion called the masse," which speak of "the altar," "the Lord's table," and "God's board," have reference to the high altar which stood at the east end of the quire and the high altar only. But any doubt which could exist must be set at rest by the following letter sent by the

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Council to Bishop Barnes on June 24, 1549, a few days only after the use of the new Prayer Book became compulsory: "After hearty commendations, having very credible notice that within that your cathedral church there be as yet the Apostles' Mass and our Lady's Mass, and other masses of such peculiar name under the defence and nomination of our Lady's Communion and the Apostles' Communion used in private chapels, and other remote places of the same, and not in the chancel, contrary to the King's Majesty's proceedings, the same being for the misuse displeasing to God, for the place, Paul's, in example not tolerable, for the fondness of the name a scorn to the reverence of the Communion of the Lord's body and blood; we for the augmentation of God's honour and glory, and the consonance of His Majesty's laws, and the avoiding of murmur, have thought good to will and command you, that from henceforth no such masses in this manner be in your church any longer used, but that the Holy Blessed Communion, according to the Act of Parliament be administered at the high altar of the church and in no other places of the same, and only at such time as your high masses were wont to be used; except some people desire (for their necessary business) to have a Communion in the morning, and yet the same to be executed in the chancel at the high altar as it is appointed in the Book of the public service, without cautele or digression from the common order; and herein you shall not only satisfy our expectation of your conformity in all lawful things but also avoid the murmur of sundry, that be therewith justly offended, and so we bid your lordship heartily farewell" (Cardwell, Documentary Annals, vol. 1, pp. 76, 77).

In the following year, 1550, at the instigation of Bishop Hooper, proceedings were taken to remove the stone altars and to substitute for them wooden tables. In his Visitatorial Injunctions Bishop Ridley exhorted the curates, churchwardens, and questmen "to erect and set up the Lord's board after the form of an honest table decently covered in such place of the quire or chancel as shall be thought most meet by their discretion and agreement, so that the ministers with the communicants may have their place separated from the rest of the people; and to take down and abolish all other by-altars or tables" (Cardwell, Documentary Annals, vol. 1, p. 95).

On June 29, 1550, the high sheriff of London was sent to see whether these injunctions were performed (Burnet, History of the Reformation, vol. 2, part 2, p. 273, Oxford ed., 1865), and on November 24, 1550, the Council sent to Ridley an order charging and commanding him to give substantial order "throughout all your diocese, that with all diligence all the altars in every church or chapel as well in places exempted as not exempted, within your said diocese be taken down and instead of them a table to be set up in some convenient part of the chancel, within every such church or chapel, to serve for the administration of the Blessed Communion" (Cardwell, Documentary Annals, vol. 1, p. 101). Similar orders appear to have been sent to every bishop about the same time and to have been universally executed (Burnet, History of the Reformation, vol. 2, part 2, p. 276, Oxford ed., 1865). With these facts before us it seems to me impossible to contend that the words of the rubric of the Second Prayer Book of Edward VI., which became law in 1552—"The table having at the Communion time a fayre white lynnen clothe upon it shall stand in the

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body of the church or in the chauncell where morning and evening prayer be appointed to bee sayde,"—could have been understood by any one at that time to have reference to any but the one table which had taken the place of the many altars, or that for the requirements of the Prayer Book of 1549, that the holy table at the east end of the quire should be used for the Holy Communion, it was intended to substitute a permission to use any one of two or more holy tables provided that that which was used stood at the Communion time at some place in the body of the church or in the chancel where morning and evening prayer were appointed to be said. The wording of the corresponding rubric in the Elizabethan Prayer Book of 1559 is identical, and, although in the interval between the two books the former had been repealed and altars restored, nothing had taken place or is contained in the latter book which could give colour to a suggestion that the revived rubric was intended or supposed to bear a meaning different from the previous one with regard to the particular point now under consideration and referred to other than a specific holy table.

The Injunctions of Queen Elizabeth issued in the same year, and the Interpretations and Further Considerations added by the archbishop and bishops, afford the clearest evidence on this point. The former, after dealing with the removal of the altars, continues: "And that the holy table in every church be decently made, and set in the place, where the altar stood, and there commonly covered, as thereto belongeth, and as shall be appointed by the visitors, and so to stand, saving when the Communion of the Sacrament is to be distributed; at which time the same shall be so placed in good sort within the chancel as whereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number communicate with the said minister. And after the Communion done from time to time the same holy table to be placed where it stood before" (Cardwell, Documentary Annals, vol. 1, p. 234). And the "Interpretations" contain the following: "Then that the table be removed out of the choir into the body of the church before the chancel door; where either the choir seemeth to be too little, or at great feasts of receivings. And at the end of the Communion to be set up again, according to the Injunctions" (Cardwell, Documentary Annals, vol. 1, p. 238). In furtherance of the orders of the Injunctions a royal visitation of certain cathedrals was ordered, and the visitors, in dealing with St. Paul's, ordered that it should be purged of all its altars, "et in loco ipsorum altarium ad providend. mensam decentem in Ecclesia pro celebratione cœnæ Domini ordinaria" (Strype, Annals of the Reformation, vol. 1, part 1, p. 251, ed. 1824). The one table was to be substituted for the many altars The provisions in the advertisements of 1566—"and that the parish provide a decente table standing on a frame for the communion table . . . .: and to sett the Tenne Commandments upon the easte wall over the said table" (Cardwell, Documentary Annals, vol. 1, p. 326), and the Articles of Enquiry issued by Archbishop Parker at his Visitation in 1569, in which it is asked, "Whether you have . . . . a comly and decent table for the Holy Communion covered decently and set in place prescribed by the Queen's Majesty's Injunctions . . . . and whether your aulters bee taken down according to the Commandemente in that behalf given" (Cardwell,

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Documentary Annals, vol. 1, pp. 355, 356)—bear similar testimony as to the public understanding that the holy table was in every church a definite single structure. I pass on to Canon 82 of 1603. Owing to the manner in which this canon is framed, its reference to both churches and tables being in the plural, it throws no direct light on the question before us. It is, however, important to note in passing that, whatever may have been the force of previous orders in the matter, this canon, which is now in full force as law, expressly directs that every holy table, whatever may be done with it at the communion time, shall at all other times stand suo certo loco (Cardwell, Synodalia, vol. 1, p. 211). The revision of the Prayer Book under James I. did not effect any change in the rubric we are considering. In connection with the action of Archbishop Laud in ordering that the holy tables should be placed at the east end of the chancels, and be railed in, so as to put a stop to the profanation to which they had been subjected, and the controversy which his action aroused (Hook, Lives of the Archbishops of Canterbury, vol. XI., p. 243, ed. 1875), I may refer to one of the orders of Bishop Wren at his Visitation in 1636, "That the communion table in every church do always stand close under the east wall of the Chancel, the ends thereof north and south, unless the Ordinary give particular direction otherwise, and that the rail be made before it according to the Archbishop's late Injunctions, reaching cross from the north wall to the south wall near one yard in height so thick with pillars, that dogs may not get in" (Cardwell, Documentary Annals, vol. 2, p. 252), and to Canon 7 of 1640, "That the standing of the communion table sideways under the east window of every chancel or chapel is in its own nature indifferent," &c. (Cardwell, Synodalia, vol. 1, p. 404), as shewing that then, as before, there could be no misunderstanding as to what was meant when the communion table was referred to. It was a single specific table to be kept in a definite spot—suo certo loco—unless it were moved at the celebration of the Holy Communion. It was *the* table of the church in which it stood. Of the suppression of the Book of Common Prayer in 1645 and the establishment in its place of the Directory it is unnecessary to say more than was said with regard to the suppression of the Second Prayer Book of Edward VI. under Queen Mary. The rubric of the Prayer Book of 1662, which directs that "the table at the Communion time having a fair linen cloth upon it shall stand in the body of the church or in the chancel, where morning and evening prayer are appointed to be said," is the same as those which are to be found in the preceding Prayer Books of 1552 and 1559, and nothing has taken place or is contained in the later book which gives any indication that an alteration in the meaning of the rubric in this matter was intended to be effected. That rubric is now law, and, even if there were nothing further to be said upon the question, I should feel bound to hold that the result of the preceding investigation had been to establish beyond all doubt the meaning to be attached to the words "the table" in it, and as a consequence to the expression in the other parts of the Communion Office, "the table," "the holy table," and "the Lord's table," which clearly all refer to the same structure. But references to the "holy table" in the Prayer Book are not confined within the limits of the Communion Office; it is referred to in the Marriage Service, and in each of the three services of the Ordinal. If the

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rubrics of the Communion Service do not refer to a specific table, that which now by universal practice stands suo certo loco at the east end of the church, neither can the rubrics of these other services be said to do so, and it must be taken that in the consecration of bishops the requirements of the law, that "after the Gospel and the Nicene Creed and the Sermon are ended, the elected bishop (vested with his rochet) shall be presented by two bishops unto the archbishop of that province (or some other bishop appointed by lawful commission), the archbishop sitting in his chair near the holy table, &c.," would be satisfied if the holy table referred to were a side table in an aisle. It is impossible to believe that such interpretation would be admissible. Nor, indeed, are statutory references to the holy table to be found only in the Prayer Book. In s. 12 of 30 & 31 Vict. c. 133, we find: "Whereas doubts are entertained whether in cases where a church or chapel has been built, repaired, or enlarged, and the external walls have been partly destroyed, or the position of the communion table altered, a reconsecration of such church or chapel be not necessary in order to the due and valid administration of divine offices there; be it declared and enacted that all marriages, rites, and ceremonies heretofore or hereafter celebrated or performed in a consecrated church or chapel which may have been rebuilt, repaired, or enlarged prior to such celebration or performance, and wherein such marriages, rites and ceremonies might have been legally solemnized or performed previously to such rebuilding, repair, or enlargement, shall be valid and effectual for all purposes, notwithstanding that upon such repair or enlargement the external walls of such church or chapel may not have remained entire, or the position of the communion table may have been altered, and notwithstanding that since such rebuilding, repair, or enlargement no reconsecration of such church or chapel may have taken place." And in s. 6 of 59 Geo. 3, c. 134, which deals with the formation of consolidated chapelries, it was ordered that "All such chapelries shall be deemed to be benefices and be subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the altar of such chapel shall be locally situate," whilst the subsequent statute of 2 & 3 Will. 4, c. 61, s. 1, is to the same effect.

In all these instances the statutes clearly regard the holy table in a church or chapel, whether it be called a "communion table" or an "altar," as a definite single structure standing in a single "loco certo." I am driven, therefore, to the conclusion that the rubrics of the Prayer Book which refer to the "Lord's table," the "holy table," and the "table" point to a single specific structure which has taken the place of the high altar, and that consequently the rubrical directions would not be obeyed unless that "table," and that "table" only, were used. I must decide, therefore, that it would be contrary to the law for this Court to sanction the introduction into St. George's Church of a second holy table, as the use of such table would necessarily involve a breach of the law. The application for a faculty must therefore be refused. (1)

(1) In the *Law Journal* Notes of May 10, 1890, and May 17, 1890, there is printed a judgment of the Chancellor of the diocese of Liverpool (R. Wintle Eyre) adopting the judgment in the *St. George, Newcastle-on-Tyne Case.*

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DIVORCE—*Confession of Adultery—Practice—Evidence.*

Although it is the general practice in matrimonial cases not to act and grant relief upon uncorroborated confessions of adultery, there is no absolute rule of practice and no rule of law precluding the Court from acting upon such uncorroborated evidence.

The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true.

If so satisfied, it is open to the Court to grant relief, notwithstanding the absence of independent corroborative testimony.

Semble, a solicitor who has acted for the respondent is a compellable witness; and his evidence as to statements made by the respondent may be accepted by the Court in coming to a conclusion as to the truth of a confession of adultery made by the respondent. GETTY *v.* GETTY - - - - - - **Bucknill J. 334**

2. —— *Foreign Marriage—Proof—Expert Evidence—Practice.*

Expert evidence is required to prove the validity of a foreign marriage, even though in a suit previously determined in this Division, between the same petitioner and respondent, to annul that marriage, it has been proved and admitted that the marriage was valid upon the assumption that a decree of divorce, upon which the capacity of the parties to contract the marriage depended, was a valid decree. BATER *v.* BATER - - - - - - **Bucknill J. 333**

3. —— *Practice—Magistrate's Order for Separation on the Ground of "Persistent Cruelty"—Wife's Petition for Divorce—Absence of verbal Corroboration of Cruelty.*

It is the practice of the Court to require corroboration of the petitioner's evidence as to cruelty, and the mere production of a certified copy of a separation order previously made between the husband and wife by a Court of summary jurisdiction on the ground of his persistent cruelty is not, as a general rule, to be considered a sufficient corroboration.

The Court may, however, in an exceptional case, relax this rule of practice where the

DIVORCE—*continued.*

evidence of the petitioner accounting for the absence of the witnesses who corroborated her when before the magistrate, and the general circumstances of the particular case, coupled with the production of a certified copy of the conviction, commend themselves to the Court as satisfactory and sufficient. JUDD *v.* JUDD
Bargrave Deane J. 241

4. —— *Practice — Suit for Dissolution of Marriage — Decree Nisi — Expiration of Six Months from the Date of the Decree—Motion by Respondent to dismiss Petition for Non-prosecution—Adjournment—Decree Nisi rescinded and Decree of Judicial Separation pronounced at the Instance of the Petitioner.*

A petitioner is entitled to a reasonable time after the expiration of the time at which the decree could, at the earliest possible date, be made absolute, in order to determine whether to proceed further or to have the petition dismissed.

Upon an adjourned motion by a respondent to dismiss a suit for want of prosecution, the Court allowed the petitioner to take a decree of judicial separation in place of the decree nisi previously obtained for dissolution of the marriage. PARSONS *v.* PARSONS - **Bucknill J. 331**

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ECCLESIASTICAL LAW — *Criminal Suit by Letters of Request—Church Discipline Act*, 1840 (3 *&* 4 *Vict. c.* 86), *s.* 13—*Proceedings by Default—Evidence—Admissions by Respondent before Institution of Suit—Reservation of the Sacrament of the Supper of Our Lord—Articles* 25 *and* 28 *of the Articles of Religion—Monition.*

The reservation of the Sacrament of the Lord's Supper is unlawful.

The incumbent of a parish church was charged in the articles in a criminal suit by letters of request promoted by the bishop of the diocese with having offended against ecclesiastical law by having, on a day specified within two years then last past, kept and caused and permitted to be kept in the parish church, after the service of Holy Communion ended, upon or over the altar part of the bread and wine consecrated at a celebration of the Holy Communion, and kept burning and caused and permitted to be kept burning a light immediately in front of the said consecrated bread and wine. The incumbent did not appear, and the articles having been admitted to proof, evidence was given at the hearing that on the day specified in connection with the above charge, the suffragan bishop in the diocese, having been present in the church and told by the respondent that the sacrament was reserved there and that it was therefore necessary to genuflect before it, had seen the light hanging in the church near the altar, in front of and above it, and the genuflections made by the choir as if they had been properly trained. Evidence was also given that in consequence of a communication from the suffragan bishop correspondence had taken place between the promoter and the incumbent before the institution of the suit, and that the incumbent had stated in one of his letters forming part of that correspondence, in reply to a question by the promoter, that the Sacrament had been reserved on or close above the altar at the parish church on the day above referred to, and that a lamp was burning before it, and the choir was trained to genuflect before it.

The Court, being of opinion that the incumbent had been charged with an ecclesiastical offence, and that that offence had been sufficiently proved, directed a monition to issue to him requiring him to abstain from keeping or causing and permitting to be kept in his church, either over the altar or elsewhere, bread and wine which had been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration, and also from keeping burning or causing or permitting to be kept burning a light in front of the said consecrated bread and wine. BISHOP OF OXFORD *v.* HENLY - **Arches Ct. of Canterbury 88**

2. —— *Faculty—Grant of Faculty for Erection of Second Communion Table—Partition of Chapel from rest of Church not essential—Discretion of Ordinary—Practice—Inhibition and Citation in Court of Arches.*

A faculty may, at the discretion of the Ordinary, be lawfully granted for the erection of a second communion table in a parish church or chapel of ease.

It is not essential to the legal existence of a second communion table authorized by such a faculty that the portion of the church or chapel of ease where the second communion table is placed should be partitioned off from the rest of the church or chapel, but the circumstances which warrant the grant of the faculty and the structural and other arrangements which should be made in any particular church or chapel when a second communion table is sanctioned are matters to be decided by the Court granting the faculty in each case.

The vicar and churchwardens and certain parishioners of a parish church in the diocese of Southwell applied in the Consistory Court of Southwell for a faculty authorizing and empowering the vicar and churchwardens to place an altar with a cross and two candlesticks thereon, or on a ledge in rear, and a credence table adjoining at the north end of the south transept of the church of St. James the Baptist, a chapel of ease within the same parish, the costs to be defrayed privately. At the hearing of the application it was proved that the use of the nave of St. James' Church for early celebrations of the Holy Communion was inconvenient, and that by the use of the south transept for such celebrations great expense in lighting the church in the winter would be saved; that a resolution in favour of the application had been passed by the parish vestry without opposition; and that the south transept would hold about fifty people, and had for some time been in use for daily morning service. The Court came to the conclusion that

ECCLESIASTICAL LAW—*continued.*

the case before it was one in which, if the faculty prayed for could be legally granted, a decree for its issue should as a matter of discretion be made, but refused to decree the grant, on the ground that it had legally no power to grant a faculty for the erection of a second holy table in a parish church or chapel of ease.

The applicants for the faculty appealed.

The Dean of the Arches allowed the appeal, and directed that the faculty applied for should issue. *In re* ST. JAMES THE GREAT, BUXTON. ST. JOHN THE BAPTIST, BUXTON (VICAR) *v.* PARISHIONERS OF THE SAME

Arches Ct. of Canterbury 368

3. —— *Faculty — Grant of Faculty for Erection of Second Communion Table.*

The statutes clearly regard the holy table in a church or chapel, whether it be called a "communion table" or an "altar," as a definite single structure standing in a single "loco certo." That the rubrics of the Prayer Book which refer to the "Lord's table," the "holy table," and the "table" point to a single specific structure which has taken the place of the high altar, and that consequently the rubrical directions would not be obeyed unless that "table," and that "table" only, were used. Faculty refused. *In re* ST. GEORGE, NEWCASTLE-ON-TYNE. JESMOND CASE (June 3, 1889)

Consist. Ct. of Newcastle, [1907] P. 381, n.

EVIDENCE—Confession of adultery—Divorce—Practice—Evidence - - - **334**
See DIVORCE. 1.

—— Criminal suit by letters of request — Admissions by respondent before institution of suit - - - - **88**
See ECCLESIASTICAL LAW. 1.

—— Foreign marriage — Proof — Expert evidence - - - - - **333**
See DIVORCE. 2.

—— Nullity of marriage—Impotence—Pleading — Insincerity — Alleged adultery of petitioner - - - - - **224**
See NULLITY OF MARRIAGE. 2.

FACULTY—Ecclesiastical law.
See under ECCLESIASTICAL LAW.

FOG—Collision—"Navigate with caution until danger of collision is over" - - **28**
See SHIPPING. 9.

FOREIGN LAWS—Bigamy—Foreign decree of nullity on ground unknown to English law—Conflict of laws—Lex loci contractus - - - - - **107**
See NULLITY OF MARRIAGE. 1.

FOREIGN MARRIAGE — Proof — Expert evidence—Practice - - - - **333**
See DIVORCE. 2.

INCORPORATION—Will and unexecuted memorandum - - - - - **228**
See PROBATE. 4.

INDEMNITY—Contract of—Collision—Damage—Third party notice - - - **296**
See SHIPPING. 7.

INSURANCE, MARINE—Collision—Total loss—Division of amount received from wrong-doer between shipowner and underwriter - - - - - **216**
See SHIPPING. 13.

JUDICIAL SEPARATION—Divorce—Practice—Decree nisi rescinded and decree for judicial separation pronounced at the instance of the petitioner - - **331**
See DIVORCE. 4.

LEX LOCI CONTRACTUS — Bigamy — Foreign decree of nullity on ground unknown to English law—Conflict of laws **107**
See NULLITY OF MARRIAGE. 1.

LIEN—Shipping—Bill of lading—Sea transit—Portion of consignment lost—Lien of shipowner in respect of railway company's charges - - - - **277**
See SHIPPING. 1.

LIMITATION OF LIABILITY — Collision — Charterer by demise—"Owners" - **254**
See SHIPPING. 10.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MARRIAGE—Divorce.
See under DIVORCE.

—— Nullity of marriage.
See under NULLITY OF MARRIAGE.

MERCHANT SHIPPING.
See under SHIPPING.

MONITION—Criminal suit by letters of request — Proceedings by default—Evidence
See ECCLESIASTICAL LAW. 1. **88**

MORTGAGE — Ship — Possession — Imperilling security of mortgagee - - - **339**
See SHIPPING. 16.

NOTICE—Charging order for costs on property "recovered or preserved"—Charge on ship—Constructive notice—Priority **1**
See SHIPPING. 17.

—— Collision—Damage—Contract of indemnity —Third party notice - - - **296**
See SHIPPING. 7.

NULLITY OF MARRIAGE—*Bigamy—Different Domicil of Parties to former Marriage—Foreign Decree of Nullity on Ground unknown to English Law—Conflict of Laws—Lex loci contractus.*

Restrictions upon and prohibitions against marriage are adjudicated upon according to the lex loci contractus.

No nation is entitled to call upon another nation, within whose territory a marriage has been celebrated, to surrender its own laws in order that effect may be given to a foreign decree annulling such marriage and based upon restrictions and prohibitions unknown to the lex loci contractus.

In the case of a marriage celebrated in England between an Englishwoman domiciled in England and a man domiciled in a country where, in the circumstances, the marriage would

NULLITY OF MARRIAGE—*continued.*
be invalid, the proper test of validity is the law of England, at any rate for the purpose of determining in England the status of the parties to the marriage.

A ceremony of marriage according to English form was celebrated in England between a domiciled Englishwoman and a domiciled Frenchman. The marriage was annulled in France at the suit of the man or of his father, whose consent to the English marriage had not been obtained and was necessary according to the law of the man's domicil.

At a later date the woman married a domiciled Englishman in England :—

Held, that this later marriage was bigamous, and must be annulled at the suit of the man who was a party to it.

Sottomayer v. *De Barros*, (1879) 5 P. D. 94, followed. OGDEN *v.* OGDEN (OTHERWISE PHILIP) - - - **Bargrave Deane J. 107**

2. —— *Impotence—Pleading—Insincerity—Alleged Adultery of Petitioner—Materiality—Evidence—Practice.*

In order to raise the question of insincerity in a suit for nullity, it is necessary that the answer should specifically allege it.

Adultery may be alleged, and, if established, is material matter for consideration on the question of the petitioner's insincerity.

The petitioner is, however, not bound to answer questions tending to establish adultery.

M. v. *D.*, (1885) 10 P. D. 175, not followed. S. (OTHERWISE G.) *v.* S.
Bargrave Deane J. 224

"OWNERS"—Collision—Limitation of liability —Charterer by demise - - **254**
See SHIPPING. 10.

PLEADING—Nullity of marriage—Insincerity — Alleged adultery of petitioner — Materiality—Evidence - - **224**
See NULLITY OF MARRIAGE. 2.

PILOTAGE—Collision—Compulsory pilotage—Assistance from master - - **244**
See SHIPPING. 5.

POLICY—Marine insurance.
See under INSURANCE, MARINE.

POSSESSION — Ship — Mortgage — Imperilling security of mortgagee - - - **339**
See SHIPPING. 16.

PRACTICE—Charging order for costs on property "recovered or preserved"—Application ex parte - - - - - - **1**
See SHIPPING. 17.

—— Costs as between solicitor and client—Damages - - - - - **65**
See SHIPPING. 18.

—— Divorce.
See under DIVORCE.

—— Pleading—Nullity of marriage—Impotence —Insincerity — Alleged adultery of petitioner—Materiality—Evidence **224**
See NULLITY OF MARRIAGE. 2.

PRACTICE—*continued.*
—— Probate.
See under PROBATE.

PRIORITY—Charging order for costs on property "recovered or preserved"—Charge on ship—Constructive notice - **1**
See SHIPPING. 17.

PROBATE — *Conduct Money — Practice — Attendance—Court of Probate Act*, 1857 (20 *&* 21 *Vict. c.* 77), *s.* 26.

Upon a motion to attach a person for not complying with an order made under s. 26 of the Probate Act, 1857, directing his attendance in Court for cross-examination as to his knowledge of a certain testamentary paper :—

Held, that the motion must be refused, no conduct money having been tendered. IN THE ESTATE OF H. HARVEY
Gorell Barnes, Pres. 239

2. —— *Conduct Money—Practice—Attendance of Witness for Examination.*

Motion to attach the respondent (husband) for disobeying an order directing him to attend at the Divorce Registry for examination as to his means. The wife (petitioner) had no separate estate.

Sir Gorell Barnes, President, said that he had come to the conclusion that conduct money was payable when the Court ordered the attendance of a witness for examination. Therefore, the technical objection must prevail and the motion must be dismissed. TOWNEND *v.* TOWNEND (July 10, 1905) - **Gorell Barnes, Pres., [1907] P. 239, n.**

3. —— *Costs—Practice.*

The two main principles which should guide the Court in determining that costs in a probate suit are not to follow the event are, firstly, where the testator or those interested in the residue have been the cause of the litigation ; and, secondly, if the circumstances lead reasonably to an investigation in regard to a propounded document. In this latter case the costs may be left to be borne by those who incurred them ; in the former, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate.

Neither of those principles, which, however, are not exhaustive, justifies a plea of undue influence unless there were reasonable grounds for putting it forward.

Wilson v. *Bassil*, [1903] P. 239, commented on. SPIERS *v.* ENGLISH
Gorell Barnes, Pres. 122

4. —— *Incorporation—Will and unexecuted Memorandum.*

To effect the incorporation of an unattested document in a duly executed testamentary paper two things have to be established—(1.) that the document was in existence when the will was made ; and (2.) it must be referred to in terms which shew with sufficient distinctness that the reference is to an existing document, so as to enable the Court to determine without doubt that it is the instrument referred to.

It is not essential that the incorporating

PROBATE—*continued.*

document should refer, in terms, to the unattested document as actually in existence.

Parol evidence is admissible to shew that the unattested document was in existence at the date of the will, and it is also admissible to enable the Court to place itself in the position of the testator at the time when he executed the incorporating document, for the purpose of construing and interpreting the testator's language and meaning; for every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare. UNIVERSITY COLLEGE OF NORTH WALES AND UNIVERSITY OF WALES *v.* TAYLOR - - **Gorell Barnes, Pres. 228**

5. —— *Revocation—Inconsistent Wills—Intention—Implication.*

A later will may revoke earlier testamentary documents, although the earlier documents may have disposed of the whole estate of the deceased, and although the last document contain no express clause of revocation and leave the residue undisposed of.

The intention of the testator or testatrix is to be gathered from a consideration of the substance, and not merely the form of the testamentary documents.

If the intention remain in doubt upon the face of the documents themselves, extrinsic evidence of the surrounding circumstances may be admitted to place the Court, as far as may be, in the position of the testator or testatrix at the time when the last document was executed. IN THE ESTATE OF BRYAN

Gorell Barnes, Pres. 125

6. —— *Revocation—"Writing declaring Intention to revoke"—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 20—*Form of Grant—Practice.*

Where a testatrix duly executed, in accordance with s. 20 of the Wills Act, a paper writing declaring her intention to revoke her existing will, the Court, in pronouncing for the revocation, directed a grant of administration to issue, as upon an intestacy, with a note thereon that the grant was so made in consequence of the execution of the said paper writing, but without annexing the said paper writing to the grant. TOOMER *v.* SOBINSKA - **Bargrave Deane J. 106**

7. —— *Several Testamentary Documents—Words of Revocation—"Last and only Will"—Intention gathered from the Documents themselves—All the Documents admitted to Probate.*

A testator in 1898 executed a will disposing of all his property and appointing his daughter executrix.

In 1903 he duly executed a document on a printed form, commencing "This is the last and only will of me," whereby he bequeathed the proceeds of an insurance policy and appointed an executor.

In 1905 he duly executed a further document, described as "a codicil to the last will," whereby he made certain bequests and appointed other executors:—

Held, that the words "last and only" in the

PROBATE—*continued.*

intermediate document did not preclude the admission to probate of all three documents. SIMPSON *v.* FOXON - **Gorell Barnes, Pres. 54**

8. —— *Will and Codicils—Construction—Form and Position of Writing forming Second Codicil.*

A testamentary document, whether will or codicil, requires no special form of words.

Where a document, duly executed and propounded as a second codicil, was written wholly on one page of one piece of paper, and formed, according to the evidence given in support of it, one transaction, it was held to be entitled to probate along with the will and first codicil, although a material portion of the second codicil was written in a space above the signatures to the first codicil. OLDROYD *v.* HARVEY

Bargrave Deane J. 326

PROOF—Divorce — Foreign marriage — Expert evidence—Practice - - - **333**
See DIVORCE. 2.

PUBLIC AUTHORITIES PROTECTION — Shipping—Act done in "intended" execution of public duty - - - **65**
See SHIPPING. 18.

—— Shipping — Collision — Action in rem — Action "against any person" - **137**
See SHIPPING. 2.

RATIFICATION — Salvage — Agreement — Position of ship's agent - - - **196**
See SHIPPING. 19.

REMOTENESS — Collision — Damage — Loss of use of vessel — Working at a loss to establish new trade - - - **286**
See SHIPPING. 8.

RESTITUTION OF CONJUGAL RIGHTS—*Wife's Petition — No Defence — Existence of Deed of Separation—Covenant not to sue for Restitution—Breaches by Respondent of Covenants in Deed — Investigation by the Court — Substantial Breaches—Decree.*

If upon the hearing of a petition for restitution of conjugal rights it appears that there has been a deed of separation executed by the parties and containing a covenant not to sue for restitution, the fact of the existence of such a deed is not to be disregarded by the Court merely because the other party to the deed does not appear and set it up as a bar.

It is the province of the Court, in such a case, to inquire into the question of breaches (if any) of the covenants in the deed, and if, upon investigation, these appear substantial, the Court will not allow a deed which has become practically useless to the petitioner to tie the hands of the Court.

The proper time for the Court to consider the effect of such a deed is on the hearing of the suit for restitution of conjugal rights, and not on the hearing of any subsequent suit by the same petitioner grounded in part on statutory desertion arising out of the respondent's disobedience to the decree for restitution.

Tress v. *Tress*, (1887) 12 P. D. 128, commented on. KENNEDY *v.* KENNEDY

Gorell Barnes, Pres. 49

REVOCATION—Inconsistent wills—Intention—Implication - - - - - **125**
See PROBATE. 5.

—— Will—Several testamentary documents—Words of revocation—"Last and only will" - - - - - - - **54**
See PROBATE. 7.

—— Will—"Writing declaring intention to revoke"—Practice - - - **106**
See PROBATE. 6.

SALVAGE — Agreement — Position of ship's agent—Ratification - - - **196**
See SHIPPING. 19.

SEPARATION—Divorce—Practice—Decree nisi rescinded and decree of judicial separation pronounced at the instance of the petitioner - - - - - - **331**
See DIVORCE. 4.

—— Magistrate's order for separation on the ground of "persistent cruelty"—Wife's petition for divorce—Absence of verbal corroboration of cruelty - - **241**
See DIVORCE. 3.

SEPARATION DEED—Restitution of conjugal rights—Wife's petition—No defence—Existence of separation deed—Covenant not to sue for restitution - - **49**
See RESTITUTION OF CONJUGAL RIGHTS.

SHIPPING—*Charterparty—Bill of Lading—Through Freight — Inland Carriage — Sea Transit—Portion of Consignment Lost—Lien of Shipowner in respect of Railway Company's Charges.*

Goods were carried under a through bill of lading at a through rate to include land and sea transit. Some of the goods were lost during the sea transit, and on delivery of the remainder the shipowner claimed—and was held entitled—to add to the through freight on the quantity delivered the inland charges paid by him to the railway company on the portion not delivered, for the joint effect of the through bill of lading, and of the shipowner's regular form of bill of lading incorporated therewith, was to subject the goods not only to a lien in favour of the shipowner in respect of the sea transit, but also to a lien, arising prior to shipment, in favour of the railway company for the land transit of the whole parcel, which lien, on payment by the shipowner of the proper inland charges to the railway company, was transferred to the shipowner, and could be enforced by him against the goods actually delivered. THE HIBERNIAN **C. A. 277**

2. —— *Collision—Action in rem—Action "against any person"—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*a*).

The provision in s. 1, sub-s. (*a*), of the Public Authorities Protection Act, 1893, limiting the period to six months, next after the neglect or default complained of, within which an action can be commenced against any person included in the Act, does not apply to an Admiralty action in rem.

The Longford, (1889) 14 P. D. 34, followed. THE BURNS - - - - - **C. A. 137**

3. —— *Collision—"All Waters connected" (with the High Seas) "Navigable by Sea-going Vessels"—"Taking any Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, Preliminary and arts.* 28, 30.

It is too late now to question, in the Court of Appeal, the validity of the direction in the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, that they are not only to be followed by all vessels upon the high seas; but "in all waters connected therewith navigable by sea-going vessels," and the reservation by art. 30 of any "special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters," shews that the general regulations were intended by their framers to apply to inland navigation except so far as they would interfere with the operation of a local rule.

The Uskmoor, [1902] P. 250, approved in respect of the interpretation there put upon the word "authorized" in art. 28—which deals with the indication by sound signals of the course taken with reference to another vessel in sight—so that the word includes the case of reversing the engines, where a vessel, not being bound to do it, does so for the purpose of avoiding risk of collision. If, therefore, in such a case, a collision occurs, and the three short blast signal has not been given at the appropriate time to indicate the course taken, the omission will, in the absence of proof to the contrary, be deemed to have by possibility contributed to the collision. THE ANSELM - - **C. A. 151**

4. —— *Collision — Barge swinging across Fairway unattended and without Light—Preliminary Article, Thames By-laws*, 1898.

The defendants' steamship coming down the river Thames at night struck and sank the plaintiffs' laden dumb-barge, which was swinging to the ebb tide athwart the fairway unattended, and held only by her headfast to another barge which was lying alongside a steamship moored at Greenwich tier:—

Held by Bargrave Deane J., that the plaintiffs, the owners of the barge, were alone to blame, for they ought to have had a man in charge ready at the turn of the tide to shew a light to approaching vessels, the absence of any warning signal being, in the circumstances, a breach of the preliminary article to the Thames By-laws, 1898, by which nothing in those by-laws "shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals or to keep a proper look-out, or of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case." THE ST. AUBIN - **Bargrave Deane J. 60**

5. —— *Collision — Compulsory Pilotage — Assistance from Master.*

The pilot in charge of a ship is entitled to

the active assistance of the master, not by way of interfering with the navigation, except in cases of manifest incapacity, but in pressing upon his attention such a matter as the nature of the lights of another vessel, about which the pilot has apparently formed a mistaken opinion involving possible risk. THE TACTICIAN
C. A. 244

6. —— *Collision — Crossing Rule — Crossing Ahead—Narrow Channel—Good Seamanship—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, 22, 25, 27.

By art. 25 of the Regulations for Preventing Collisions at Sea, 1897, "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel," and, as a matter of seamanship, the waterway between two opposite points, such as the ends of the breakwaters forming the western entrance to the harbour of Cherbourg, together with so much of the adjacent water as is necessary for the navigation of the passage, should be treated as a narrow channel within the meaning of this article.

Decision of Sir Gorell Barnes, President, [1907] P. 36, affirmed. THE KAISER WILHELM DER GROSSE - - - - - - - **C. A. 259**

7. —— *Collision — Damage — Contract of Indemnity—Third Party Notice.*

A steamship was brought from the entrance of a dock to her berth by two tugs, and was made fast; but was unable to haul on her winches, so as to get completely into position alongside the quay, owing to a barge, attached to a buoy, being in the way. The dockmaster sent a man from each of the tugs to loosen the barge's headfast, and directed a third tug to tow the barge away; but, in so doing, the barge was negligently allowed to come into contact with the propeller of the steamship and sustained such damage that she sank with her cargo.

In an action of damage by collision brought by the barge owners against the dock owners, the dock owners admitted liability, but brought in the steamship owners as third parties liable to indemnify them under a towage contract made between the dock owners and a firm of ship repairers who had undertaken to bring the vessel from their yard to her berth at their risk. By the towage contract the dock owners were to supply tugs to assist in transporting the steamship within the dock on condition that the masters and crews of the tugs should cease to be under the dock owners' control in connection with the towage, and become subject to the orders and control of the master or person in charge of the vessel, and be the servants of the owners thereof:—

Held by the Court of Appeal (affirming the decision of the Court below, [1906] P. 317), that the steamship owners were not liable, as third parties, to indemnify the dock owners, for, whether the contract to supply the two tugs was made with the ship repairers or with the steamship owners, that contract was at an end, and, therefore, the men from the two tugs, directed by the dockmaster to loosen the headfast, had resumed their position as servants of the dock owners, and the action of the third tug, under the direction of the dockmaster, was independent of the transporting contract, which applied only to the two tugs. THE KATE
C. A. 296

8. —— *Collision—Damage—Loss of Use of Vessel—Working at a Loss to establish new Trade—Remoteness.*

In the case of a vessel, worked at a loss to establish a new trade, and temporarily put out of employment whilst undergoing repairs necessitated by a collision, the contingent profit which may hereafter be earned, when the trade is established, and rates become remunerative, is too remote to be taken into consideration as special damage, and, in such a case, there being no loss, apart from actual expenses, which can be shewn to result from the deprivation of the use of the vessel, general damages are also not recoverable from the owner of the wrong-doing ship. THE BODLEWELL
Bargrave Deane J. 286

9. —— *Collision — Fog — "Navigate with Caution until Danger of Collision is over"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 16.

Those in charge of a steam vessel, proceeding at night at slow speed on account of fog, stopped the engines on learning the proximity of another steam vessel by the sound of her whistle, the bearing of which was taken by compass and made out to be a point and a quarter to a point and a half on the port bow, and estimated to be at a considerable distance. Whilst the vessel was losing steerage way and falling off her course the sound of subsequent whistles apparently broadened a point. The engines were then put dead slow ahead to get steerage way and bring the vessel back to her course, and so continued for some twenty minutes, during which time, although the sound of the whistle was getting closer, it was estimated to have broadened so as to be about four points on the port bow. A collision occurred:—

Held by Sir Gorell Barnes, President, that as in fog the estimated bearing of sound signals cannot be relied on, there was no sufficient ground for assuming that the sound of the whistle was broadening to such an extent as to justify continuing on for twenty minutes without stopping from time to time, and, therefore, there had been a breach of the 2nd paragraph of art. 16 of the Regulations for Preventing Collisions at Sea, by which a "steam vessel hearing apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." THE ARAS
Gorell Barnes, Pres. 28

10. —— *Collision—Limitation of Liability—Charterer by Demise—"Owners"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 71.

Charterers by demise are not "owners"

within the meaning of s. 503 of the Merchant Shipping Act, 1894, and, therefore, cannot, under that section, claim the benefit of limitation of liability in respect of loss or damage caused by the improper navigation of the ship by their servants [but see now s. 71 of the Merchant Shipping Act, 1906].

Decision of Bargrave Deane J., [1906] P. 34, affirmed. THE HOPPER NO. 66 - C. A. 254

11. —— *Collision*—"*Not under Command*"—"*Aground*"—"*Authorized or required by these Rules*"—*Regulations for Preventing Collisions at Sea*, 1897, *arts.* 4, 11, 28.

Just before sunrise, but in daylight, and in the shallow water of Monte Video Roads, the plaintiffs' and the defendants' steamships were, at the material time, crossing vessels within the meaning of art. 19 of the Regulations for Preventing Collisions at Sea. The plaintiffs' vessel was pursuing a southerly course at about three knots, and had the defendants' vessel on her starboard bow at about right angles. As the giving-way vessel, the plaintiffs' vessel ported to pass under the stern of the defendants' vessel, but struck her on the port quarter, and was held to blame for not taking sufficient or timely steps to avoid collision.

The defendants' vessel, of deeper draught, was slowly dragging through the mud on an easterly course at about one mile per hour, and to assist in her progress, she was, from time to time, putting her engines full speed astern, the last occasion being for the first three out of the eight minutes preceding the collision:—

Held by the majority of the Court of Appeal (Lord Alverstone C.J. and Kennedy L.J.), affirming the decision of Sir Gorell Barnes, President, that the defendants' vessel was free from blame, as she was not bound to exhibit two red lights under art. 4 or 11, being neither "not under command" nor "aground" within the meaning of those articles, nor was she under any obligation to give the three short blast signal on putting her engines full speed astern, as she was so manœuvring with her engines, from time to time, in the ordinary course of navigation to enable her to go ahead as fast as the condition of the mud would permit, and was not, within the meaning of art. 28, taking a course "authorized or required by these rules," with reference to the other vessel in sight.

Held by Fletcher Moulton L.J., that the defendants' vessel was also to blame, as, at a material time, when the two vessels were in sight of one another within the meaning of art. 28, she failed, on putting her engines full speed astern, to give the prescribed sound signal, and it had not been proved that the infringement of the regulation could not by possibility have contributed to the collision.

Per Fletcher Moulton L.J.: *Quære*, whether the "departure from the above rules" authorized by art. 27 has any application to the imperative directions contained in art. 28. THE BELLANOCH - - - - - - - C. A. 170

12. —— *Collision — Suez Canal — Relative Duties of North and South going Vessels—Regulations for the Navigation of the Canal*, 1905, *arts.* 3, 7, 8, 10, *and Night Signal* 11.

Although it is the recognized practice in part of the Suez Canal for a south-going vessel to tie up in due time to allow a north-going vessel to pass, still, in their exercise of this right of way, those in charge of the north-going vessel have a relative duty cast upon them to act reasonably, and, therefore, they must reduce speed, and keep their vessel so well in hand as to be able promptly to bring her to a standstill should they find themselves approaching too near whilst the giving-way vessel is completing the manœuvre of making fast. These precautions are especially necessary at night owing to the difficulty of accurately estimating the distance of the lights of the south-going vessel before she exhibits the particular lights prescribed by the rules as an indication that the north-going vessel may safely pass. THE CLAN CUMMING - C. A. 311

13. —— *Collision—Total Loss—Payment by Wrong-doer—Insurance, Marine—Valued Policy—Partial Insurance — Division of Amount received from Wrong-doer between Shipowner and Underwriter.*

The owners of a steamship, which had run down a schooner, paid into Court 1000*l.*, the value of the schooner as assessed in the registry. Underwriters who had paid the owners of the schooner 1000*l.*, as being the amount for which she was insured, under a policy stating the value to be 1350*l.*, claimed the 1000*l.*:—

Held by the Court of Appeal (Sir Gorell Barnes, President, Fletcher Moulton and Kennedy L.JJ.), affirming the decision of Bargrave Deane J., that the owners of the schooner were entitled to be treated as their own insurers for 350*l.*, and, therefore, the 1000*l.* must be divided between them and the underwriters in the proportion of their respective interests, viz., 350-1350ths, and 1000-1350ths. THE COMMONWEALTH - - - C. A. 216

14. —— *Collision—Wreck raised by Thames Conservancy—Arrest by Marshal — Damage — Lien—Expenses of raising—Priorities—Thames Conservancy Act*, 1894 (57 *&* 58 *Vict. c. clxxxvii.*), *s.* 77.

As the result of a collision in the Thames between a barque and a steamship, the latter sank with her cargo. The Thames Conservators, under their statutory powers, raised the vessel, and, after she was beached, she was arrested by the Admiralty marshal in an action of damage by collision instituted by the owners of the barque. On the question of priority as between the Thames Conservancy in respect of their expenses, and the owners of the barque in respect of their lien attaching to the vessel for the damage sustained by them:—

Held by Bargrave Deane J. that, as the res had been preserved through the instrumentality of the Conservators, their claim ranked first, and, therefore, they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any,

SHIPPING—*continued.*

of proceeds into Court for the benefit of the parties entitled thereto. THE SEA SPRAY
Bargrave Deane J. 133

15. —— *Collision — Wreck, Removal of—Liability for Expense—Abandonment—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 77—*Costs.*

By s. 77 of the Thames Conservancy Act, 1894, it is provided, inter alia, that the conservators shall, in the case of a vessel sunk in the river, cause such vessel to be raised and sold, and, out of the proceeds of such sale, reimburse themselves for the expenses incurred, and, in case such proceeds shall be insufficient, "the deficiency shall be paid to the conservators by the owner of such vessel upon demand, and, in default of payment, may be recovered" as a debt:—

Held by Bargrave Deane J., that, on the true construction of this section, the conservators were entitled to be paid the deficiency by the owner of the vessel sunk whether that owner had, prior to the expenses being incurred for raising her, abandoned the vessel or not, and therefore, that question being immaterial, the defendants, the owners of the wrong-doing ship which came into collision with and sank the plaintiffs' vessel, must refund to the plaintiffs the amount of the deficiency which the conservators had recovered by action from the plaintiffs; but, as a matter of discretion, not the costs of defending the action brought by the conservators against the plaintiffs, as no one has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance of an action which he cannot defend. THE WALLSEND
Bargrave Deane J. 302

16. —— *Mortgage of Ship — Possession — Imperilling Security of Mortgagee.*

If the dealings with a ship by the mortgagor are of such a character as to be inconsistent with the sufficiency of the security, the mortgagee may take possession, although there has not been any actual default on the part of the mortgagor under the mortgage, and although the mortgagee has not commenced any formal proceedings. THE MANOR - - **C. A. 339**

17. —— *Practice—Charging Order for Costs on Property "recovered or preserved"—Application ex parte—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Charge on Ship—Constructive Notice—Priority.*

After the termination of an action in rem against the owners of a ship for wages and disbursements in which the plaintiff was partially successful, and after the release of the ship from arrest and its transfer to a limited company, the solicitors of the original defendant owners applied ex parte and obtained, under s. 28 of the Solicitors Act, 1860, a charging order upon the ship for their costs in the action. For the enforcement of this charge they also obtained, on notice to mortgagees to whom the vessel had been mortgaged by the limited company, a further order for the appointment of a receiver of freight, and, conditionally, for the sale of the vessel.

SHIPPING—*continued.*

Both orders were subsequently set aside, and the solicitors, admitting that the charging order must be postponed to the mortgage, appealed as against the lim ted company:—

Held by the Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.), affirming the decision of Sir Gorell Barnes, President, that the charging order was wrong in form and bad in substance, and, together with the consequential order, must be set aside, for, at the most, the property, if any, preserved by the exertions of the solicitors was limited to the interest of those who instructed them to oppose the claims of the master in respect of his lien on the barque, and the vessel had not only ceased to be under the control of the Court, but had changed hands, and become subject to a mortgage, before the charging order was applied for. Furthermore, the company, to whom the vessel was transferred, could not be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors, even though the actual vendor and the promoter of the company were one and the same person.

The Court, when sitting in Admiralty, should follow the practice of the Chancery Division in requiring notice to the parties affected, and, unless the circumstances are very exceptional, should not exercise, on an ex parte application, its discretionary power of making charging orders under the Solicitors Act, 1860. THE BIRNAM WOOD - - - - - **C. A. 1**

18. —— *Practice—Costs as between Solicitor and Client—Action against Tyne Improvement Commission — Damage — Judgment for Defendants—Statutory Power—Mode of Exercise—Deviation—Act done in "intended" Execution of Public Duty—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1, *sub-s.* (*b*).

In an action by the owners of a steamship against the Tyne Improvement Commission for the amount of the damage occasioned to the vessel by a fire which originated on one of the defendants' coal staiths, judgment was given in favour of the defendants on the ground that they, as owners of the staith, had not been guilty of negligence. The defendants thereupon claimed, under sub-s. (*b*) of s. 1 of the Public Authorities Protection Act, 1893, to recover from the unsuccessful plaintiffs their costs as between solicitor and client:—

Held by Sir Gorell Barnes, President, that the defendants were a public authority, and as such entitled to have their costs so taxed, for in the erection and working of the staith they must be taken to have acted in "intended" execution of a public duty within the meaning of the Act, although the staith, and the line of railway connected with it, might not have been constructed in strict conformity with their statutory powers, the question of deviation from deposited plans being for the parties affected thereby, such as the neighbouring owners, and not for the plaintiffs. THE JOHANNESBURG
Gorell Barnes, Pres. 65

19. —— *Salvage—Agreement — Position of Ship's Agent—Ratification.*

A large steamship belonging to the defendants,

SHIPPING—*continued.*
laden with sugar from Java to Port Said for orders, was coaled at Colombo by the plaintiffs, who acted in the usual way as ship's agents. A few days afterwards the vessel grounded on Gofar Island in the Maldives and remained fast. Her master sent the chief officer back to Colombo with a letter to the plaintiffs acquainting them with the situation, telling them that he wanted a powerful tug, and that they were to draw on the defendants, the owners of the ship, for disbursements. He also suggested that a contract for a salvage boat, "no cure, no pay," might be advisable. The plaintiffs, finding that the latter proposition was impracticable, engaged a Government tug at a rate working out at about 60*l.* a day, and, making themselves personally liable for the payment of the hire, insured the tug for a limited period. The tug proceeded to the vessel with a representative of the plaintiffs on board. The master, doubting whether his vessel could be got off, declined to accept the services of the tug except on a "no cure, no pay" agreement, and accordingly, after some discussion with the plaintiffs' representative as to terms, the master signed a letter agreeing on behalf of the defendants to pay the plaintiffs 4000*l.* if the vessel was successfully floated. The tug then made fast, and, in the course of the next day's towage, the vessel came off. The plaintiffs claimed 4000*l.* :—

Held by the Court of Appeal (Lord Alverstone C.J., Fletcher Moulton and Kennedy L.JJ.), affirming the decision of Sir Gorell Barnes, President, [1907] P. 15, that the plaintiffs could not be allowed to ratify the act of their representative, as, in the circumstances, the substituted agreement, insisted upon by the master and assented to by their representative, by which they were constituted salvors, was unreasonable, and the plaintiffs must be deemed, not only when engaging the tug, but throughout the operations, to have acted as agents of the ship. In that capacity they were only entitled to recover by personal action repayment of their disbursements, together with the usual agency charges. THE CRUSADER - - C. A. 196

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